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No. 687

In the Supreme Court of the United States

OCTOBER TERM, 1946

JOHN H. FAHEY AND A. V. AMMANN, INDIVIDUALLY AND RESPECTIVELY AS FEDERAL HOME LOAN BANK COMMISSIONER AND CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, APPELLANTS

v.

PAUL MALLONEE, C. H. NEWHOUSE, WINNIE BUCKLIN, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLANTS

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	3
Statement	4
Specification of errors to be urged	16
Summary of argument	17
Argument	26
I. The District Court should not have passed upon the constitutionality of Section 5(d) of the Home Owners' Loan Act	28
A. Judicial relief is not available until appellees have exhausted their administrative remedy	28
B. Appellees are estopped from contesting the validity of Section 5(d)	35
C. The District Court's lack of jurisdiction over Fahey prevented the granting of much, if not all, of the relief against appellants	4
1. The District Court did not have jurisdiction over Fahey	46
2. Fahey is an indispensable party to the granting of much, if not all, of the relief secured by appellees	53
II. Section 5(d) of the Home Owners' Loan Act is constitutional	57
A. Detailed standards guiding administrative action are provided expressly and by implication	58
1. The appointment of a conservator	58
a. Meaning of "conservator"	60
b. Equity receivership doctrines	66
c. State rules on appointment of conservators	68
d. Express statutory standards	72
e. Background of the Act; nature of savings and loan associations	76
2. Merger	79
B. The statutory standards are sufficient	81
C. An administrative hearing may properly be provided by regulation	87
III. The District Court erred in entering a final judgment	90

Argument—Continued Page

IV. The interpleaders and cross-claims of appellees Title Service Company and Wallis, and the third-party complaint against the Federal Home Loan Banks, were erroneously allowed 95

Conclusion 100

Appendix A: Section 5 of Home Owners Loan Act, Pertinent Federal Statutes, and Regulations 103

Appendix B: Executive Order 9070 (creating Federal Home Loan Bank Administration) 117

Appendix C: State statutes providing for the taking over of building and loan associations 120

CITATIONS

Cases:

Ainsworth v. *Barn Ballroom Co.*, 157 F. 2d 97 55

Alma Motor Co. v. *Timken Co.*, No. 11, this Term, decided December 9, 1946 34

American Bond and Mortgage Co. v. *United States*, 52 F. 2d 318, certiorari denied, 285 U. S. 538 ..... 41, 42

American Power & Light Company v. *Securities and Exchange Commission*, Nos. 4 and 5, this Term, decided November 25, 1946 ..... 24, 32, 59, 66, 73, 76, 84, 88

Appalachian Electric Power Co. v. *Smith*, 67 F. 2d 451 50

Arrow Distilleries v. *Alexander*, 24 F. Supp. 880, affirmed on other grounds, 306 U. S. 615 33

Ashwander v. *Tennessee Valley Authority*, 297 U. S. 288 39

Avent v. *United States*, 266 U. S. 127 82

Baltimore and Ohio Ry. Co. v. *Lambert Run Coal Co.*, 267 Fed. 776, certiorari denied, 254 U. S. 637 ..... 41, 43

Bettle v. *Republic Savings and Loan Assn.*, 63 N. J. Eq. 578 71

Booth Fisheries Company v. *Industrial Commission of Wisconsin*, 271 U. S. 208 ..... 41, 42

Bowles v. *Willingham*, 321 U. S. 503 ..... 32, 84, 89

Brooks v. *Dewar*, 313 U. S. 354 ..... 55, 56

Buck v. *Kuykendall*, 267 U. S. 307 43

Burnrite Coal Co. v. *Riggs*, 274 U. S. 208 67

Bushnell v. *Leland*, 164 U. S. 684 88

Buttfield v. *Stranahan*, 192 U. S. 470 ..... 59, 77

Camp v. *Boswell*, 203 Fed. 913 51

Carter v. *Carter Coal Co.*, 298 U. S. 238 ..... 84, 85

Chamberlain v. *Lembeck*, 18 F. 2d 408 55

Clarke v. *Boyson*, 39 F. 2d 800, certiorari denied, 282 U. S. 869 52

Cocke v. *Halsey*, 16 Pet. 71 97

Colorado v. *Toll*, 268 U. S. 228 56

Currin v. *Wallace*, 306 U. S. 1 84

Cases—Continued.

	Page
Dakota Central Tel. Co. v. *South Dakota*, 250 U. S. 163	83
Dalton Machine Co. v. *Virginia*, 236 U. S. 699	32
Dan Cohen Realty Co. v. *National Savings & Trust Co.*, 125 F. 2d 288	48, 51, 52
Daniels v. *Tearney*, 102 U. S. 415	42
Davis Trust Co. v. *Hardee*, 85 F. 2d 571	63
Devine v. *City of Los Angeles*, 202 U. S. 313	50
Dodge v. *Woolsey*, 18 How. 331	67
Doran v. *Charles D. Kaier Co.*, 60 F. 2d 259	55
Electric Company v. *Dow*, 166 U. S. 489	40
Elkison v. *Wilborn*, 281 U. S. 457	40
Employers Reinsurance Corp. v. *Bryant*, 299 U. S. 374	99
Federal Power Comm. v. *Arkansas Power & Light Co.*, No. 543, this Term, decided per curiam March 10, 1947	31
Federal Radio Comm. v. *Nelson Bros. Co.*, 289 U. S. 266	83
Federal Reserve Board v. *Agnew*, No. 66, this Term, decided January 6, 1947	83, 89
Federal Trade Commission v. *Claire Furnace Co.*, 274 U. S. 160	33
Federal Trade Commission v. *Gratz*, 253 U. S. 421	67
Federal Trade Commission v. *R. F. Keppel & Bros.*, 291 U. S. 304	67, 83
Field v. *Clark*, 143 U. S. 649	83
Findlay v. *Florida East Coast Ry. Co.*, 68 F. 2d 540, certiorari denied, 292 U. S. 623	48, 51
First Federal Savings and Loan Association of Wisconsin v. *Loomis*, 97 F. 2d 831, certiorari granted, 305 U. S. 564, and dismissed on motion of petitioners, 305 U. S. 666	86
First Nat. Bank v. *Fellows ex rel. Union Trust Co.*, 244 U. S. 416	82
First Nat. Bank v. *Weld County*, 264 U. S. 450	33
Forgay v. *Conrad*, 6 How. 201	93
Friday & Co. v. *United States*, 61 F. 2d 370	93
Frost v. *Corporation Commission*, 278 U. S. 515	44
General Investment Co. v. *Lake Shore & M. S. Ry. Co.*, 260 U. S. 261	48, 51
Gilchrist v. *Interborough Co.*, 279 U. S. 159	34
Guerich v. *Rutter*, 265 U. S. 388	55
Goldsmith v. *United States Board of Tax Appeals*, 270 U. S. 117	31, 32
Gorham Mfg. Co. v. *State Tax Commission*, 266 U. S. 265	32, 33
Grand Rapids & Indiana Ry. Co. v. *Osborn*, 193 U. S. 17	40, 42
Great Northern Ry. Co. v. *United States*, 315 U. S. 262	77
Greer v. *Cline*, 148 F. 2d 380	56
Groves v. *Sentell*, 153 U. S. 465	98
Gulf Refining Co. v. *United States*, 269 U. S. 125	93
Hampton & Co. v. *United States*, 276 U. S. 394	84

Cases—Continued

	Page
Howes v. *Oakland*, 104 U. S. 450	27
Highland Farms Dairy Co. v. *Agnew*, 300 U. S. 608	34
Hopkins Federal Savings & Loan Assn. v. *Cleary*, 296 U. S. 315	45, 78, 86
Howard v. *United States ex rel. Alexander*, 126 F. 2d 667; certiorari denied, 316 U. S. 699	46
Intermountain Rate Cases, The, 234 U. S. 476	59, 68
Interstate Consolidated Street Ry. Co. v. *Massachusetts*, 207 U. S. 79	40
Jarvis v. *Shackleton Inhaler Co.*, 136 F. 2d 116	56
Jump v. *Ellis*, 100 F. 2d 130, certiorari denied, 306 U. S. 645	55
Killian v. *Ebbinghaus*, 110 U. S. 568	98
Knox Nat. Farm Loan Assn. v. *Phillips*, 300 U. S. 194	86, 93
Ladew v. *Tennessee Copper Co.*, 218 U. S. 357, affirming 179 Fed. 245	49, 51
Lawrence v. *St. L.-S. F. Ry.*, 274 U. S. 588	33
McGregor v. *Hogan*, 263 U. S. 234	33
McQuillen v. *Dillon*, 98 F. 2d 726	52
McQuillen v. *National Cash Register Co.*, 112 F. 2d 877, certiorari denied, 311 U. S. 695	52
Macauley v. *Waterman Steamship Corp.*, 327 U. S. 540	31
Moor v. *Texas & N. O. R. Co.*, 75 F. 2d 386	41, 43
Mulford v. *Smith*, 307 U. S. 38	84
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41	31, 32, 33, 35
National Broadcasting Co. v. *United States*, 319 U. S. 190	82
National Conference on Legalizing Lotteries, Inc. v. *Goldman*, 85 F. 2d 66	55
Neher v. *Harwood*, 128 F. 2d 846, certiorari denied, 317 U. S. 659	56
New York Central Securities Corp. v. *United States*, 287 U. S. 12	59, 82, 83
North Dakota-Montana Wheat Growers' Assn. v. *United States*, 66 F. 2d 573, certiorari denied, 291 U. S. 672	41, 43, 44
Nuckolls v. *United States*, 76 F. 2d 357	40, 41
Opp Cotton Mills v. *Administrator*, 312 U. S. 126	84
Ozawa v. *United States*, 260 U. S. 178	77
Panama Refining Co. v. *Ryan*, 293 U. S. 388	58, 59, 82, 84, 85
People ex rel. Barrett v. *The Logan County Bldg. & Loan Assn.*, 369 Ill. 518	72, 78
Perkins v. *Lukens Steel Co.*, 310 U. S. 113	87
Phillips v. *Commissioner*, 283 U. S. 589	89
Pierce Oil Corp. v. *Phoenix Ref. Co.*, 259 U. S. 125	41
Pittsburgh Plate Glass Co. v. *Labor Board*, 313 U. S. 146	81
Platt v. *Union Pacific Railroad Co.*, 99 U. S. 48	77
Price v. *Gurney*, 324 U. S. 100	27
Robertson v. *Railroad Labor Board*, 268 U. S. 619	46, 99

Cases—Continued

	Page
Rood v. *Goodman*, 83 F. 2d 28, certiorari denied, 299 U. S. 551	56
Ryan v. *Amazon Petroleum Corp.*, 71 F. 2d 1, reversed on other grounds, 293 U. S. 388	56
St. Louis Malleable Casting Co. v. *George C. Prendergast Construction Co.*, 260 U. S. 469	42
St. Louis-San Francisco Ry. Co. v. *Alabama Pub. Serv. Comm.*, 279 U. S. 560	32, 35
Sanders v. *Fertilizer Works*, 292 U. S. 190	98
Sanford Fork & Tool Co., Re, 160 U. S. 247	93, 94
Schechter Corp. v. *United States*, 295 U. S. 495	84, 85
Shepard v. *Barron*, 194 U. S. 533	44
Shields v. *Utah Idaho Central R. Co.*, 305 U. S. 177	81
Smith v. *Witherow*, 102 F. 2d 638	63
Spellman v. *Sullivan*, 43 F. 2d 762	49
Stark v. *Wickard*, 321 U. S. 288	89
State ex rel. Bellman v. *Court of Common Pleas*, 124 Ohio St. 269	72
State ex rel. Tanner v. *Northwestern Inv. Co.*, 70 Wash 381	71
State Savings & Commercial Bank v. *Anderson*, 238 U. S. 611, affirming 165 Cal. 337	88
Stitzel-Weller Distillery, Inc. v. *Norman*, 39 F. Supp. 182	53
Sunshine Coal Co. v. *Adkins*, 310 U. S. 381	81, 82, 84
Tagg Bros. & Moorhead v. *United States*, 280 U. S. 420	82
Transcontinental & Western Air, Inc. v. *Farley*, 71 F. 2d 288, certiorari denied, 293 U. S. 603	46
Treigle v. *Acme Homestead Assn.*, 297 U. S. 189	79, 86
Trienies v. *Sunshine Mining Co.*, 308 U. S. 66	98
Union Bridge Co. v. *United States*, 204 U. S. 364	82
Union Pacific Railroad Co. v. *Public Service Commission*, 248 U. S. 67	42
Union Savings and Investment Co. v. *District Court*, 44 Utah 397	71
United Fuels Gas Co. v. *R. R. Commission*, 278 U. S. 300	44
United States v. *Chemical Foundation*, 272 U. S. 1	82
United States v. *City and County of San Francisco*, 310 U. S. 16	39, 41, 42
United States v. *Curtiss-Wright Export Corp.*, 299 U. S. 304	87
United States v. *Rock Royal Cooperative*, 307 U. S. 533	84
United States v. *Ruzicka*, No. 54, this Term, decided December 16, 1946	33
United States v. *Stewart*, 311 U. S. 60	76
United States ex rel. Doss v. *Lindsley*, 148 F. 2d 22, certiorari denied, 325 U. S. 835	97
Utley v. *St. Petersburg*, 292 U. S. 106	89
Varney v. *Warehime*, 147 F. 2d 238, certiorari denied, 325 U. S. 882	56

Cases—Continued

	Page
Veiz v. *Seneca Bldg. and Loan Assn.*, 126 N. J. L. 314	72, 78
Vidal v. *South America Securities Co.*, 276 Fed. 885	51
Waite v. *Santa Cruz*, 184 U. S. 302	97
Wall v. *Parrot Silver & Copper Co.*, 244 U. S. 407	42, 44
Warner Valley Stock Co. v. *Smith*, 165 U. S. 28	55
Waterbury Savings Bank v. *Danaher*, 128 Conn. 78	86
Webster v. *Fall*, 266 U. S. 507	55
White v. *Johnson*, 282 U. S. 367	33
Wilhelm v. *Consolidated O. Corp.*, 84 F. 2d 739	48, 51, 52
Winthrop Iron Co. v. *Meek*, 109 U. S. 180	93
Yakus v. *United States*, 321 U. S. 414	24, 32, 34, 69, 84, 85, 89
Yarnell v. *Hillsborough Packing Co.*, 70 F. 2d 435	56

Statutes:

Act of June 30, 1876, 19 Stat. 63	88
Act of August 24, 1937, 28 U. S. C. 380a: Sec. 3	4
Administrative Procedure Act, Public Law No. 404, 79th Cong., 2d Sess., Sec. 10	89
Bank Conservation Act of March 9, 1933, c. 1, Sec. 203, 48 Stat. 2, 12 U. S. C. 203	62, 88
The Banking Act of 1933 (Act of June 16, 1933, c. 89, Sec. 31, 48 Stat. 162, 12 U. S. C. 71a)	64
Deering's General Laws of the State of California, Act 986, Sec. 13.11	71, 122
Federal Home Loan Bank Act, c. 522, 47 Stat. 725, 12 U. S. C. 1424: Sec. 4 (a); Sec. 5	75, 110
Federal Reserve Act, 38 Stat. 251, 262, 12 U. S. C. 248 (k): Sec. 11 (k)	81, 82
Home Owners' Loan Act of 1933, c. 64, 48 Stat. 128, as amended, 12 U. S. C. 1461:	
Sec. 5	2, 44, 45, 54, 64, 80
Sec. 5 (a)	73, 74, 103
Sec. 5 (b)	73, 103
Sec. 5 (c)	73, 103
Sec. 5 (d)	2, 21, 26, 43, 54, 59, 60, 73, 81, 85, 86, 87, 104
Sec. 5 (e)	73, 74, 80, 104
Sec. 5 (f)	43, 73, 75, 104
Sec. 5 (g)	43, 74, 105
Sec. 5 (h)	43, 74, 106
Sec. 5 (i)	107
Sec. 5 (j)	43, 107
Sec. 5 (k)	74, 108
Sec. 6	109
Sec. 7	109
Burns Indiana Statutes Annotated (1933), section 18-301	123
Internal Revenue Code, Sec. 3797, 26 U. S. C. 3797	61
Interpleader Act of 1936	97

Statutes—Continued. Page

Investment Company Act of 1940, Sec. 3, 15 U. S. C. 80a-3 (c) (3) 61
Jones' Illinois Stat., Sec. 14.40 71
Judicial Code, Sec. 24 (26), 28 U. S. C. 41(26) 53, 97, 98
Judicial Code, Sec. 51, 28 U. S. C. 112 46
Judicial Code, Sec. 57, 28 U. S. C. 118 ..... 2, 9, 29, 46, 52
Kentucky Rev. Stat. (1946) Sec. 289.420 126
Annotated Laws of Massachusetts, vol. 3, c. 93, Sec. 34 121
General Laws, Massachusetts, Chap. 167, Sec. 22; Chap. 170B 71, 121
National Housing Act (Act of June 27, 1934, c. 847):
Sec. 306, 48 Stat. 1246, 12 U. S. C. 1721 65
Title IV, 12 U. S. C. 1724 79
Sec. 403, as amended 110
Sec. 406, 48 Stat. 1246, 12 U. S. C. 1729 65
National Industrial Recovery Act:
Sec. 3 84
Sec. 9c 85
New Jersey Statutes Annotated, Title 17, Article 11, Sec. 17 124
New York Banking Law, Sec. 606 ..... 71, 120
Page's Ohio General Code, Sec. 687 ..... 71, 124
Revised Statute 5234, as amended, 12 U. S. C. 191-192 88
Securities Exchange Act of 1934, Sec. 3, 15 U. S. C. 78c (a)-(6) 61
Trust Indenture Act of 1939, Sec. 310, 15 U. S. C. 77 jjj (b)-(9) 61

Miscellaneous:

Annual Report of Federal Savings and Loan Assns. for 1936 26
1 Clark, *A Treatise on the Law and Practice of Receivers* (2d ed. 1929):
Sec. 46 (a) 67
Sec. 46 (c) 67
Sec. 49 67
Sec. 53 67
2 Clark, *A Treatise on the Law and Practice of Receivers* (2d ed. 1929):
Sec. 702 67
Sec. 747 67
Sec. 908 67
Executive Order 9070 ..... 6, 117
Federal Home Loan Bank Review, Vol. 13, No. 5, Feb., 1947 26
Federal Register for June 8, 1946, Vol. 11, p. 6245 13

Miscellaneous—Continued

	Page
Federal Rules of Civil Procedure:	
Rule 14 (c)	99
Rule 22 (1)	97, 98
Rule 23 (b)	27
Home Loan Bank Administration:	
Order No. 5254	6
Order No. 5309	13, 31
H. Doc. No. 19, 73rd Cong., 1st Sess	64
H. Rept. No. 55, 73rd Cong., 1st Sess	64
H. Rept. No. 210, 73rd Cong., 1st Sess	64
Kress, *Introduction to the Cooperative Movement*	50
1 Moore & Friedman, *Moore's Federal Practice*, p. 345	49
2 Moore & Friedman, *Moore's Federal Practice*, p. 2196	96
Oxford English Dictionary	60
Rules and Regulations for the Federal Savings and Loan System:	
Sec. 204.1 (b)	54
Sec. 206.1	111
Sec. 206.2	12, 29, 54, 87, 114
Sec. 206.3	115
Sec. 206.4	49, 115
Sec. 208.4	54
S. Rept. No. 91, 73rd Cong., 1st Sess	64
Sundheim, *Law of Building and Loan Association* (3rd ed. 1933): Sec. 190–191 and Appendix	68, 71
Webster's New International Dictionary	60, 63
Westerfield, *Money, Credit and Banking* (1938), p. 409	64

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BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the District Court of the United States for the Southern District of California (R. 374–378) is reported in 68 Fed. Supp. 418.

JURISDICTION

The judgment of the district court was entered on September 30, 1946 (R. 490–500). The petition for appeal was presented on October 2, 1946

(R. 506–507) and allowed on October 3, 1946 (R. 511–512). The case was docketed in this Court on November 9, 1946. On December 9, 1946, this Court noted probable jurisdiction of the case (R. 766). The jurisdiction of this Court rests upon Sections 2 and 3 of the Act of August 24, 1937, c. 754, 50 Stat. 751, 28 U. S. C. 349a, 380a.

QUESTIONS PRESENTED

1. Whether Section 5 (d) of the Home Owners' Loan Act of 1933 improperly delegates legislative power, and is therefore unconstitutional.

2. Whether a Federal savings and loan association organized under Section 5 of the Home Owners' Loan Act, and shareholders thereof suing derivatively, are estopped from attacking the constitutionality of Section 5 (d) of that Act.

3. Whether a Federal savings and loan association, and its shareholders, suing to oust a conservator appointed pursuant to Section 5 (d) of the Home Owners' Loan Act, must pursue their administrative remedies before seeking judicial relief.

4. Whether Section 57 of the Judicial Code, 28 U. S. C. 118, authorizes out-of-state service in a suit on behalf of a Federal savings and loan association, located within the district, to oust a conservator appointed pursuant to Section 5 (d) of the Home Owners' Loan Act, and, if so, whether Section 57 authorizes the issuance of

personal orders, injunctions, and decrees against a defendant served outside the State, and not appearing in the action.

5. Whether the Commissioner of the Federal Home Loan Bank Administration is an indispensable party defendant to an action to oust a conservator appointed pursuant to Section 5 (d) of the Home Owners' Loan Act, on the ground that the section is unconstitutional.[1]

6. Whether a district court may properly enter a contested final judgment, granting all relief prayed for by plaintiffs, before defendants' time to answer has expired, without granting defendants an opportunity to present all of their defenses, and in the absence of any motion for final judgment or relief.[1]

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Home Owners' Loan Act of 1933, c. 64, 48 Stat. 128, 12 U. S. C. 1461, 1464, of the Federal Home Loan Bank Act, c. 522, 47 Stat. 725, 12 U. S. C. 1421; and of the

[1] Subsidiary questions presented are:

7. Whether Section 5 (d) of the Home Owners' Loan Act is unconstitutional because it does not provide, on its face, for an administrative hearing before appointment of a conservator.

8. Whether the Title Service Company's and Wallis' cross-claims in interpleader were properly pleadable under the Federal interpleader provisions.

9. Whether the District Court erred in granting leave to the Long Beach Federal Savings and Loan Association to file a third-party complaint against the Federal Home Loan Banks of Portland, Los Angeles, and San Francisco.

National Housing Act, c. 847, 48 Stat. 1246, 12 U. S. C. 1701 are set forth in Appendix A, *infra*, pp. 103–111. Pertinent provisions of the Rules and Regulations issued pursuant to Section 5 of the Home Owners' Loan Act are also set forth in Appendix A, *infra*, pp. 111–116.

STATEMENT

This appeal is from a judgment of a specially constituted three-judge court, convened pursuant to Section 3 of the Act of August 24, 1937, 28 U. S. C. 380a, holding Section 5 (d) of the Home Owners' Loan Act unconstitutional, enjoining appellants from continuing the conservatorship of Long Beach Federal Savings and Loan Association established pursuant to that section, and restoring the Association to its former management.

The undisputed facts relevant on this appeal, are as follows:[2]

[2] The case was heard and decided by the lower court only on (a) appellant Ammann's motions to dismiss the complaint and cross-complaints for failure to state a cause of action and for lack of an indispensable party, (b) appellant Fahey's motion to dismiss for lack of jurisdiction and service, and (c) appellees' motions for *preliminary* injunctions restraining merger of the Long Beach Federal Savings and Loan Association and restraining the holding of an administrative hearing, and accompanying affidavits. Nevertheless, as will appear, *infra*, pp. 14–15, 90–95, the District Court granted final judgment and all relief prayed for in the complaint and cross-complaints. In our view, the record to be considered by this Court consists primarily of the pleadings (R. 1–17, 30–39, 54–63, 181–232, 312–315), the motions before the District Court and accompanying affidavits (R. 21–23, 67–81, 82–

In 1934, on application of its organizers, the Long Beach Federal Savings and Loan Association (hereinafter referred to as the Association or Long Beach) was chartered by the Federal Home Loan Bank Board under rules and regulations adopted pursuant to authority granted in Section 5 of the Home Owners' Loan Act of 1933, as amended (R. 140–141). The original charter provided that the Association "shall at all times be subject to the provisions of the Home Owners' Loan Act of 1933, providing for Federal savings and loan associations, and to any amendments thereof, and to valid rules and regulations made thereunder as the same may be amended from time to time," and that it might be "liquidated, merged, consolidated, or reorganized, as is provided in the rules and regulations for Federal savings and loan associations" (R. 141, 160). In 1937, upon the Association's request, an amended charter was issued, which likewise provided that the Association was to exercise its powers subject

96, 98–177, 260–263, 279–304), and the opinion (R. 374–378) and judgment (R. 490–500) of the lower court. Appellees have, however, designated substantially the entire record of the case in the District Court, including such irrelevant matter as motions by appellees which were denied and from which no appeal was taken (R. 379–424), uncontested relief granted to intervenors as to which no question is raised (R. 247–254, 265–278, 305, 319–327), pleadings filed after entry of judgment below and appeal taken (R. 486–489, 512–513, 529–544), and the full transcript of oral argument in the lower court (R. 547–760).

to the Home Owners' Loan Act and regulations issued thereunder (R. 143–144, 164).

On May 20, 1946, acting pursuant to Section 5 and the pertinent rules and regulations, Appendix A, *infra,* pp. 103–108, 111–116, the Federal Home Loan Bank Administration[8] issued its Order No. 5254 appointing A. V. Ammann as Conservator for the Association, on the grounds that it had been determined that the Association was conducting its business in an unlawful, unauthorized and unsafe manner; that it had a management which was unsafe and unfit to manage a Federal savings and loan association; and that it was pursuing a course that was jeopardizing and injurious to the interests of its members, its creditors and the public (R. 83, 85–86, 290–291). On the day of his appointment, the Conservator assumed his duties, and since that time, with the exception of the first two days in October, 1946, he has been charged with the exclusive management of the Association (R. 296, 493).

On May 27, 1946, the plaintiffs below, shareholders in the Association, suing individually and as representatives of all the shareholder members of the Association, brought this action in the

[8] The Federal Home Loan Bank Administration (sometimes referred to herein as the Bank Administration) was vested by Executive Order 9070, Appendix B, *infra*, pp. 117–119, with all the duties, powers and authority of the Federal Home Loan Bank Board, and the Chairman of the Federal Home Loan Bank Board serves as Commissioner of the Federal Home Loan Bank Administration.

United States District Court for the Southern District of California. Named as the principal defendants were A. V. Ammann, individually and as the "purported Conservator" for the Association, and John H. Fahey, individually and as Chairman of the Federal Home Loan Bank Board. Also joined as defendants were the Long Beach Federal Savings and Loan Association itself, and several John Doe defendants. The complaint, as amended (R. 1–17, 312–315), alleged that defendants Fahey and Ammann arbitrarily, unlawfully, without cause and without due process, seized possession and control of the Long Beach Federal Savings and Loan Association and deprived it of all its assets, books, records, etc. (R. 5–6); that said "seizure" was motivated purely and solely by malice and ill will; that none of the acts of Congress under which the defendants were acting provides for any judicial review; that the regulations adopted by the defendants purported to give themselves the authority under which they acted without prior notice or hearing; that said delegation of legislative authority to make and create their own rules and regulations for hearings and "seizures" did not set forth nor prescribe any rules, guides or controls; and that paragraphs (a) and (d) of Section 5 of the Home Owners' Loan Act of 1933, as amended, and the Rules and Regulations promulgated pursuant thereto, are repugnant to the Constitution of the United States and void (R. 11–15, 314–315). The

prayer was that the Conservator be removed; that the officers and directors of the Association be returned to control; that the defendants be required to account to the Association for all monies and income of all kinds received by them during the alleged Conservatorship; that temporary and permanent injunctions issue restraining the defendants from merging the Association with any other; and for declaratory relief (R. 15–17). Alleging also that the enforcement of a law of Congress was sought to be enjoined on the grounds of its repugnancy to the Constitution of the United States, the complaint asked that a three-judge court be convened pursuant to the provisions of Section 3 of the Act of August 24, 1937, 28 U. S. C. 380a (R. 2).

Coincidentally with the filing of the complaint, the plaintiffs filed motions for a preliminary injunction and a temporary restraining order to restrain the defendants from merging the Association with any other association (R. 21–27). The temporary restraining order issued immediately (R. 27–28).

Personal service of the summons was secured upon Ammann (R. 19), but Fahey, being an official inhabitant of the District of Columbia (R. 261), could not be reached in California (R. 20–21). The plaintiff filed a motion, on June 5, for substituted service upon Fahey on the ground that he could not be found within the State of California, and had not appeared voluntarily.

The motion stated that it was made pursuant to the provisions of Judicial Code, Section 57, 28 U. S. C. 118 (R. 43–45). An order issued pursuant to the motion (R. 45), and service of process upon Fahey was made in the District of Columbia (R. 46–48).

On June 4, 1946, Title Service Company, trustee under numerous deeds of trust securing loans made by the Association,[4] filed an answer and cross-claim in interpleader, alleging that it was one of the John Doe defendants, setting up its trusteeship, asserting the unconstitutionality of the Home Owners' Loan Act, and alleging that the defendants Fahey and Ammann had delivered to it 174 notes and deeds of trust, together with instructions to reconvey said property to the trustors. The cross-claim alleged further that the defendant Long Beach Federal Savings and Loan Association (acting through its officers and directors) had notified Title Service Company that the authority of Ammann and Fahey to act for the Association was invalid and unconstitutional, and that the Title Service Company was thereby faced with conflicting demands. The cross-claimant deposited in the registry of the court the 174 deeds of trust, together with the requests for reconveyances, and prayed that the defendants be required to interplead and litigate their conflicting claims to the

[4] The officers and directors of Title Service Company are almost identical with those of the Long Beach Federal Savings and Loan Association (cf. R. 522).

said 174 deeds of trust; that the court determine the respective rights in and to the said notes and deeds of trust; that the Title Service Company be instructed as to its duties and that it be released and discharged from all responsibilities as trustee (R. 30–39).[5]

On June 12, 1946, one Robert H. Wallis filed another answer and cross-claim in interpleader, also stating that he was one of the John Doe defendants (R. 54–63). His cross-claim alleged that he was depositing with the registry of the court a cashier's check in the sum of $50,000; that the check had been received by him as attorney for the Long Beach Federal Savings and Loan Association for attorney's fees, costs and expenses incurred and to be incurred in contemplated litigation which "would be necessary in its appeal to the courts for justice and protection from the vindictive and unwarranted destruction of said association by said John H. Fahey, et al." (R. 58). The cross-claim alleged that Fahey and Ammann personally, or as Conservator or in some other capacity, claimed that they were entitled to and owners of the check and the funds it represents,

[5] Thereafter, pursuant to court order and agreement of the parties, the Home Investment Company, trustor on these 174 deeds of trust, deposited approximately $800,000 in the registry of the District Court, and secured reconveyances by the Title Service Company (R. 247–254, 265–277, 305, 319–327). The sum of $800,000 remains in the court's registry. No question concerning these transactions with Home Investment Company is presented here.

and that the defendant Long Beach insisted and demanded that said check and the funds it represents be used for the purpose for which it was appropriated, and for the resistance and defense of the Association against the "illegal, unconstitutional and malicious attack made upon it by the said defendants John H. Fahey and A. V. Ammann." The cross-claim prayed that Fahey and Ammann be required to set forth their claims to the said check, that Long Beach likewise be required to do so, and that the court adjudge and determine their respective rights (R. 61–63). Service of process upon Fahey under both cross-claims in interpleader was made in the District of Columbia (R. 48–53, 63–67).

On July 1, 1946, the Association, pursuant to leave granted by the court (R. 179–181), and acting through its former management,* filed a third-party complaint against the Federal Home Loan Bank of Los Angeles, the Federal Home Loan Bank of Portland and the Federal Home Loan Bank of San Francisco, alleging that the merger of the Federal Home Loan Bank of Los Angeles and the Federal Home Loan Bank of Portland into the Federal Home Loan Bank of San Francisco was unlawful, unconstitutional and arbitrary, and praying for a decree that the third-

*Whenever reference is made, in this brief, to the Association of Long Beach taking a position or action in this litigation, the reference is to the Association acting through its former management.

party defendants be required to account to the Association for all of its assets which now are or have been in the possession of the third-party defendants or any of them, and that the court decree in which Federal Home Loan Bank the third-party plaintiff (i. e. the Association) owns stock, and which Bank is actually in existence (R. 222–232).[7] The Association also filed an answer to the original complaint and a cross-complaint against Fahey and Ammann, making essentially the same allegations as in the original complaint, and praying for substantially the same relief (R. 181–221).

Meanwhile the Association had, in May 1946, demanded, pursuant to Section 206.2 of the Regulations, *infra*, p. 114, a more definite statement of the causes for the Conservator's appointment (R. 83, 86–87), and such a statement was promptly furnished by the Bank Administration (R. 83–84, 88–91). On May 30, 1946, the Association, through its president and secretary, demanded the administrative hearing provided by Section 206.2, in order to show cause why the

[7] By order of the Federal Home Loan Bank Administration, the Federal Home Loan Bank of Los Angeles was combined, prior to the institution of the conservatorship or the present action, with the Federal Home Loan Bank of Portland, and the latter bank was moved to San Francisco, and its name changed to Federal Home Loan Bank of San Francisco (R. 291–295). A controversy has arisen regarding this merger, and a separate suit has been filed in the Southern District of California to set it aside. This suit has not yet been heard. See *infra*, pp. 99–100.

Conservator should not have been appointed and why he should be removed (R. 84, 92–94). The Bank Administration thereupon issued its Order No. 5309 directing the holding of such administrative hearing on July 3, 1946 in the city of Los Angeles (R. 84, 94–96). The order was duly served (R. 84) and published in the Federal Register for June 8, 1946, Vol. 11, page 6245.

On June 20, and July 1, 1946, respectively, the shareholder plaintiffs added to their pending motion to enjoin a merger of the Association (R. 67–76) (*supra*, p. 8), motions for a preliminary injunction and for a temporary restraining order to restrain the holding of the administrative hearing theretofore demanded by the Association's old management (R. 98–124, 236–243). The Title Service Company filed like motions (R. 125–128, 129–139) and the Association orally joined (R. 567–568). A temporary restraining order was immediately issued (R. 244–245).[8]

Appellant-defendant Ammann moved, on June 14, to dismiss the original complaint on the grounds that the court was without jurisdiction over appellant-defendant Fahey, an indispensable party, and that the complaint failed to state a

[8] The Association (R. 76–80), with the concurrence of the shareholder plaintiffs (R. 69), also moved the District Court "that plaintiffs' motion for a preliminary injunction restraining and enjoining the defendants from various acts be heard by the Honorable Court upon oral testimony in court of witnesses to be produced and subpoenaed to attend said hearings." (R. 77.)

cause of action (R. 82–96); Ammann later moved to dismiss the answer and cross-claim in interpleader of appellees Wallis and Title Service Company, as failing to state a cause of action (R. 262–263). Appellant Fahey appeared specially to move the dismissal of the action, or in lieu thereof, the quashing of the return of service of summons upon him, on the grounds that, since his official residence was in the District of Columbia and his personal residence in Massachusetts, he could not be sued in California, and that he had not been properly served with process in the action (R. 260–261). No answer was filed by either defendant-appellant to any of the complaints or cross-complaints, and time to answer had not expired, at the time of the judgment below.[9]

These pending motions[10] were set for hearing (R. 232–234) before a three-judge court, consisting of one circuit judge and two district judges (R. 305), which convened on July 15 and heard argument mainly upon the constitutionality of Section 5 (d) of the Home Owners' Loan Act (R. 306–308, 317–318, 607–704, especially R. 625,

[9] On September 9, 1946, the District Court extended the time of all parties to plead to a date "20 days after the entry of the Order or Judgment upon the Opinion of the court heretofore filed" (R. 379).

[10] The lower court's findings, conclusions, and decree list the various motions which were before the three-judge court (R. 491–492). They include only those motions referred to above, pp. 8, 13–14, plus an unopposed motion by plaintiffs to amend their complaint.

630, 704). On September 5, the three-judge court handed down an opinion holding that statutory provision invalid and ordering that judgment was to be "entered in accordance with this opinion" (R. 374–378). Without further hearings[1] or pleadings, the court, on September 30, entered its decree granting all the permanent relief asked for by plaintiffs, the two cross-claimants in interpleader, and by the Association in its answer and cross-complaint. The decree (a) ordered the Conservator's removal, (b) permanently restrained appellants from merging the Association, (c) permanently restrained appellants from holding an administrative hearing, (d) restored the old management to control of the Association, (e) ordered appellants to account for all transactions occurring during their control of the Association, and (f) permanently enjoined appellants "from ever asserting any claims, right, title, or interest" in or to the Association's property (R. 496–500).

The District Court refused to stay the execution and enforcement of its decree (R. 501–502), and a stay was secured from a Justice of this Court (R. vii). Thereafter, appellees filed a

[1] Appellees unsuccessfully (R. 758) moved a single judge, on September 14, 1946, before the issuance of the decree of the three-judge court, to oust the Conservator forthwith and restore the old management (R. 379–424, 710–760). No appeal has been taken by appellees from the denial of their motions.

motion to vacate the stay, which was denied by the Court on December 9, 1946.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In denying appellant Fahey's motion to dismiss or in lieu thereof quash the return of service of summons.

2. In denying appellant Ammann's motion to dismiss the complaint.

3. In making a determination upon the constitutionality of Section 5 (d) of the Home Owners' Loan Act of 1933.

4. In holding Section 5 (d) of the Home Owners' Loan Act of 1933 unconstitutional, and in failing to hold it constitutional.

5. In rendering a final judgment, before answer, without any appropriate motion or application for final relief or judgment, and without appropriate hearing and opportunity for defense; and in making final findings of fact and conclusions of law.

6. In denying appellant Ammann's motion to dismiss the answer and cross-claim in interpleader of appellee Title Service Company.

7. In denying appellant Ammann's motion to dismiss the answer and cross-claim in interpleader of appellee Wallis.

8. In granting the motion of appellee, Long Beach Federal Savings and Loan Association, for leave to file a third-party complaint against the

Federal Home Loan Bank of San Francisco and others.

9. In holding that it had jurisdiction of appellant Fahey, and that Section 57 of the Judicial Code was applicable to the instant action, and in entering personal orders, injunctions, and decrees against appellant Fahey.

10. In failing to hold that appellees are estopped from attacking the constitutionality of Section 5 (d) of the Home Owners' Loan Act.

11. In failing to hold that the complaint and cross-claims should be dismissed, and all relief denied, because appellees have not exhausted their administrative remedies.

12. In granting appellees' motions for preliminary injunction against appellants, in granting preliminary and permanent injunctions against appellants; in ousting appellant Ammann from control of the Long Beach Federal Savings and Loan Association; in restoring the former management to control of said Association; in ordering appellants to account; in declaring that they had no right, title, claim, or interest in the Association's property, and in granting other relief against them.

13. In entering its findings of fact, conclusions of law, and decree against appellants.

SUMMARY OF ARGUMENT

I. The District Court erred in passing upon the constitutionality of Section 5 (d) of the Home

Owners' Loan Act: First, the "long settled rule of judicial administration" requires appellees to exhaust their administrative remedy before seeking judicial relief. This they have failed to do. The Rules and Regulations for the Savings and Loan System provide for a full hearing on the appointment of a conservator, at the request of an association, and such a hearing was actually demanded by the Long Beach Federal Savings and Loan Association, and was about to be held by the Bank Administration when appellees reversed their position and secured injunctive relief against it. Under the established doctrine of exhaustion of administrative remedies, this rejection of the Bank Administration's hearing is sufficient to preclude all judicial relief and require dismissal of the action. The exhaustion doctrine applies even though it is claimed that Section 5 (d) is unconstitutional on its face. An administrative decision in favor of appellees, and return of the Association to its former management, will render the instant action moot, and disposition of the constitutional question, entirely unnecessary. Similarly, appellees are not excused from pursuing their administrative remedy because that remedy follows rather than precedes the appointment of the conservator. Such a hearing accords due process (see Point II (c)), and its successful pursuit would make the present judicial proceeding superfluous.

Secondly, appellees are estopped from contesting the validity of Section 5 (d). The Association

was voluntarily organized (mainly by the persons composing its present management) in 1934, under Section 5; both the Association and its organizers specifically agreed, in the charter and otherwise, to accept every term of that statute; at all times Section 5 (d), as it now stands, has formed a part of the statute, and the regulations concerning appointment of a conservator have remained substantially the same; the Association has carried on its business under the Act, under the Bank Administration's supervision, and secured the benefits of the Act, for over twelve years. Thus, those who organized Long Beach, became its shareholders, or dealt with it, did so voluntarily, with full knowledge of the applicable statutes and regulations. They have accepted the statute's benefits, and now seek to free themselves from burdensome, but integral, restrictions. For the period of the Association's existence, they have consistently invoked Section 5, and they must even now rely upon it in this proceeding to prove any right to recover; nevertheless they seek simultaneously to assail it. And to permit the overturn of Section 5 (d) would break faith with those who invested in or dealt with the Association in the belief that the Government's supervisory authority was what the statute provided. For these reasons, appellees are estopped, under established authority, from challenging the constitutionality of Section 5 (d).

Thirdly, the District Court lacked jurisdiction over appellant Fahey, Commissioner of the Federal Home Loan Bank Administration, who was never served in California, did not voluntarily appear, and has his official residence in the District of Columbia. Jurisdiction cannot be rested on Section 57 of the Judicial Code, governing actions "to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district"; the main relief sought here is an *in personam* decree enjoining action by appellants, rather than the adjudication of property rights; no real issues as to title, lien, clouds upon title, or claims to property exist. In any case, jurisdiction under Section 57 does not accord the District Court the right to grant any relief, against the absent defendant, which sounds *in personam*. Here, the lower court's decree contains both mandatory and prohibitory provisions requiring appellant Fahey to take designated action, and costs are even assessed against him.

Fourthly, appellant Fahey was an indispensable party, at least as to the injunction against merger of the Association and against the holding of an administrative hearing, since Ammann, the Conservator, possesses no authority or functions in those fields. Personal jurisdiction over Fahey not having been obtained in any case, the District Court plainly erred in granting such relief. As

for the portions of the decree ousting the Conservator from control of the Association, and restoring it to its old management, Fahey's indispensability is less clear. The cases are widely in conflict, but we submit, without developing the argument, that in the circumstances of this case the superior should have been joined.

For the foregoing reasons, the District Court should have dismissed the entire action, without passing upon the constitutionality of Section 5 (d). At the least, that court should not have granted any personal relief against Fahey, and should not have enjoined a merger of the Association or the holding of the administrative hearing.

II. In any event, Section 5 (d) of the Home Owners' Loan Act is clearly valid.

A. The court below held that Congress failed to provide sufficient standards for administrative action in appointing a Conservator, but, in our view, detailed policy and standards are provided, both expressly and by implication. There are at least five sources from which the administrator can draw guidance:

> (a) The meaning and connotation of the word "conservator," both in normal speech and legal usage, reveals significant criteria for the appointment of such an official. Generally, a conservator protects from injury someone or something which is unable to protect itself. In the field of the regula-

tion of financial institutions, only three months before the adoption of Section 5, in June 1933, Congress had invented the conservatorship as a new method of handling national banks whose affairs were not in satisfactory condition; it is reasonable to assume that Congress intended the Federal Home Loan Bank Board to be similarly guided. Light is also shed by other Federal statutes concerning conservators.

(b) The administrators of Section 5 can also find direction in the large body of judicial doctrine governing the appointment of receivers and similar officials, to which the statute implicitly refers. If the Act had authorized a court to appoint a conservator or receiver, no claim of unlawful delegation of legislative power would have been made. But the standards which would guide judicial action in such a case also exist for a non-judicial administrator.

(c) A third standard is supplied by the body of state rules governing appointment of receivers, conservators, or liquidators of state-regulated building and loan associations. Congress has expressly referred the Bank Administration to these state rules by requiring it to give "primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." Section 5 (a). There is general agreement on the reasons and occasions for the state's taking possession of a mutual association, and a definite group

of standards, subsidiary policies, and rules exists to guide the Administration. The Administration's regulation on the appointment of a receiver or conservator follows the best of these state provisions very closely.

(d) Section 5 itself contains several standards to be applied to Section 5 (d), in addition to the reference to state practice quoted above, and to the general context of the Act. In particular, Subsections (a) and (e) establish applicable standards, and there are also incorporated by reference the standards of eligibility for insurance by the Federal Savings and Loan Insurance Corporation and for membership in a Federal Home Loan Bank. These express standards alone furnish a "verifable code of rules" governing appointment of a conservator.

(e) Finally, regard must be had to the reasons for the creation of Federal savings and loan associations, the events of the period of the enactment of Section 5, the nature of mutual building and loan associations, the traditional close supervision of their activities, and the interests which have been and must now be protected by governmental regulation. Especially to experts in the field, consideration of these factors leads to adequate standards for action, just as the broad standard of "public interest" draws meaning from the purpose of the act, the statutory scheme, and the context of the provision.

B. This Court's decisions on delegation of legislative power sustain the sufficiency of these standards, whether Section 5 (d) be narrowly confined to its own terms, or read more hospitably in the light of its background and statutory context. At their narrowest, the policy and standards guiding the Bank Administration are at least as specific and definite as "interurban," "bituminous coal," "appropriate" bargaining unit, "public interest," "just and reasonable rates," "unreasonable obstruction to navigation," or "primarily"—all of which have been upheld. If the section be read, as we urge, as referring the Administration to multiple factors bearing on a conservator's appointment, there is even less ground in the cases for invalidation. See *Yakus* v. *United States*, 321 U. S. 414; *American Power & Light Co.* v. *Securities and Exchange Commission*, this Term, Nos. 4 and 5, decided November 25, 1946.

C. The District Court also invalidated Section 5 (d) because it does not in terms provide for an administrative hearing. It may be doubted whether a hearing is constitutionally required in this case, but in any event the statute specifically authorizes the adoption of rules and regulations governing the appointment of a conservator, and those regulations provide for a full hearing. Appellees were tendered, but refused, a hearing, and thus actually received the full measure of due process. The holding of the hearing after the conservator's appointment does not deny due

process. Harm is not likely to come to an institution during a temporary unnecessary conservatorship, but failure of the Bank Administrator to take speedy action, when that appears *prima facie* necessary, may cause irreparable injury. Some twenty-five States provide for governmental taking over of State-regulated building and loan associations without prior hearing.

III. The District Court plainly erred in entering a final judgment after a hearing limited to plaintiffs' motions for partial preliminary relief and defendants' motion to dismiss for lack of jurisdiction and failure to state a cause of action. All the relief appellees had prayed for in their complaint and cross-complaints was granted, even though appellants' time to answer had not expired and they were not in default, and without any trial on the facts or opportunity for the appellants to answer, present further defenses, or disprove factual allegations on which appellees' right to relief rests.

IV. Title Service Company's and Wallis' cross-claims in interpleader should have been rejected, as failing to come within Federal interpleader requirements. These two interpleaders were designed and have been used solely as a device for adding two outside parties, neither of whom has the slightest standing to contest constitutionality, to attack the validity of Section 5 (d). The third-party complaint of the Association, acting

through its former management, against the Federal Home Loan Banks of Los Angeles, Portland, and San Francisco should also have been rejected as improper under the Federal Rules, and calculated to entangle this case with another unrelated action.

ARGUMENT

The District Court has invalidated, in its entirety, section 5 (d) of the Home Owners' Loan Act,[12] which is the primary source of the power by which the Federal Home Loan Bank Administration can enforce its supervisory authority over Federal savings and loan associations.[13] This action was taken in disregard of two significant canons of decision which should have prevented a decision of the issue of unconstitutionality: (a) appellees, having willingly received the benefits and invoked the provisions of the statute, are now

[12] Section 5 (d) provides as follows:

"The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation."

[13] At the end of 1933, there were 59 Federal savings and loan associations, with $513,203 of total assets. *Annual Report of Federal Savings and Loan Associations for the Year Ended December 31, 1936.* At the end of 1946, there were 1,471 Federal savings and loan associations, with $4,671,503,000. *Federal Home Loan Bank Review*, Vol. 13, No. 5, February, 1947, page 163, Table 13.

estopped to attack it, and (b) appellees have rejected the administrative remedy open to them. Moreover, the determination of unconstitutionality on the ground of improper delegation of legislative authority was made with but the slightest consideration of the nature of the statute, the type of institutions it regulates, the express and implied standards of administrative action to be found within it, and with a narrow reading of Congressional acts—practices which this Court has long disavowed. Finally, by its unique and precipitate granting of final relief before appellants had opportunity to present all their defenses, the lower court departed from orderly and just judicial administration. For these main reasons, we believe that the District Court's judgment should be reversed, and the case dismissed. Appellees have cluttered the case and the record with a conglomerate of unproven and untried charges, a mass of claims against appellants and a multiplicity of parties,[14] but, in our view, the issues

[14] It is probable that the shareholder plaintiffs, suing derivatively to enforce the Association's alleged cause of action against appellants (*Price* v. *Gurney*, 324 U. S. 100, 105), have no standing to sue, since they have failed to show and cannot show, despite some shadowy allegations in their amended complaint (R. 313–314), that they have exhausted all means to secure action by the Association itself, as is required in all secondary actions by shareholders. *Hawes* v. *Oakland*, 104 U. S. 450, 460–461; Federal Rules of Civil Procedure, Rule 23 (b). The alacrity with which the Association, acting through its officers, cross-claimed against appellants is proof enough of its willingness to proceed with the action. This

presented to this Court, on this appeal, involve those matters of constitutional law and proper judicial practice which have been outlined. We shall not, therefore, undertake to deny or disprove the allegations as to misconduct by appellants which are improperly strewn throughout the record, nor shall we engage in documenting, at this stage of the litigation, the charges which the Federal Home Loan Bank Administration has made against the former management of the Long Beach Federal Savings and Loan Association.

I

THE DISTRICT COURT SHOULD NOT HAVE PASSED UPON THE CONSTITUTIONALITY OF SECTION 5 (D) OF THE HOME OWNERS' LOAN ACT

A. *Judicial relief is not available until appellees have exhausted their administrative remedy*

The complaint of appellee-shareholders and of the appellee-Association should have been dis-

willingness is further demonstrated by the fact that the Association, at the instance of the directors, joined in both motions for interlocutory injunctions, and, having admitted all the allegations in the original complaint, joined with the plaintiffs in arguing against appellants' motions to dismiss (R. 626–650, 701–702), and consented to the District Court's decree (R. 456–463), although its cross-complaint had not been put in issue at the time of the hearing. The result is that the shareholders and the Association have pursued the same course, sought the same relief, and maintained the same views throughout this litigation. Although this duplication of parties is burdensome, we do not here press the plaintiffs' lack of standing to sue derivatively, since the Associaiton itself is an active party to the action and dismissal of the shareholders' complaint would not end the litigation.

missed as premature because these appellees have not exhausted their administrative remedies.[15] The crux of the entire suit was the alleged invalidity and impropriety of the appointment of the Conservator and the taking over of the Association.[16] But there was plainly available to appellees an administrative remedy through which they might secure the full redress of withdrawal of the order appointing the Conservator. The applicable regulations provide for an administrative hearing, at the request of an association, at which the association "may appear and show cause why the conservator or receiver should not have been appointed and why an order should be entered by the Federal Home Loan Bank Administration discharging the conservator or receiver."[17] The Association, acting through its

[15] Dismissal of these complaints would necessarily lead to dismissal of the interpleaded cross-claims which rest upon the main claims.

[16] In addition to the unconstitutionality of Section 5 (d) of the Home Owners' Loan Act, the complaint and cross-complaints allege that the action of the Bank Administration in appointing the Conservator was arbitrary (R. 5–10, 11, 314, 197), and appellees may have intended thereby to place in issue the validity of the appointment, even if Section 5 (d) be held constitutional.

[17] The applicable paragraph of the regulations reads as follows:

"206.2 *Hearing on appointment.*—Within fourteen days (Sundays and holidays included) after the appointment of a conservator or receiver for a Federal association not at the time of such appointment in the hands of a conservator, such Federal association, which has not, by its board of directors, consented to or requested the appointment of a conservator

board of directors, actually proceeded under this provision and, in May 1946, requested such an administrative hearing (R. 92–94). But on July 1, 1946, the main appellees (i. e. the shareholders and the Association) turned around and asked the District Court temporarily to restrain the holding of the administrative hearing which they had requested, and moved for a preliminary injunction to the same effect (R. 98–124, 567–568). Not only have they refused to exhaust the administrative remedy specifically provided for these cases, but they have fought to prevent the Bank

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or receiver, may file an answer and serve a written demand for a hearing, authorized by its board of directors, which demand shall state the address to which notice of hearing shall be sent. Upon receipt of such answer and written demand for a hearing the Federal Home Loan Bank Administration shall issue and serve a notice of hearing upon the institution by mailing a copy of the order of hearing to the address stated in the demand therefor and shall conduct a hearing, at which time and place the Federal association may appear and show cause why the conservator or receiver should not have been appointed and why an order should be entered by the Federal Home Loan Bank Administration discharging the conservator or receiver. Such hearing shall be held either in the district of the Federal Home Loan Bank of which such Federal association is a member or in Washington, D. C., as the Federal Home Loan Bank Administration shall determine, unless the association otherwise consents in writing. Such hearing may be held before the Federal Home Loan Bank Commissioner or before a trial examiner or hearing officer, as the Federal Home Loan Bank Administration shall determine. Such Federal association, which has not, by its board of directors, consented to or requested the appointment of a conservator or receiver, may, within seven days (Sundays and holidays included) of such appointment, serve a written or telegraphic demand, authorized by its

Administration from making that remedy available to them.[18]

Appellees' complaint should, therefore, have been dismissed under the "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51; *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540; *Goldsmith* v. *United States Board of Tax Appeals*, 270 U. S. 117, 123; *Federal Power Comm.* v. *Arkansas Power & Light Co.*, this Term, No. 543, decided *per curiam* March 10, 1947. No reason appears why appellees should not have proceeded with the administrative hearing which they initiated, and if the outcome proved unsatisfactory, thereafter sought judicial relief. That the administrative hearing in this case is provided by lawful regulation rather than by the statute is certainly not ma-

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board of directors, upon the Federal Home Loan Bank Administration for a more definite statement of the cause or causes for the action. The time of service upon the Federal Home Loan Bank Administration for the purposes of this Section shall be the time of receipt by the Secretary of the Federal Home Loan Bank Administration."

[18] Under the terms of Order No. 5309, dated June 5, 1946, which set the administrative hearing, shareholders and other interested parties could intervene in and appear at the hearing (R. 25):

"And it is further ordered that any person, partnership, association, or corporation claiming to have an interest in the subject matter involved may, at any time before the closing of the hearing, file a petition for leave to intervene at said hearing."

terial. *Goldsmith* v. *United States Board of Tax Appeals, supra; American Power & Light Company* v. *Securities and Exchange Commission,* this Term, Nos. 4 and 5, decided November 25, 1946, slip opinion, pp. 12–14; see *infra,* pp. 87–89. And appellees are not excused from pursuing their administrative remedy because that remedy follows rather than precedes the order of appointment. *Goldsmith* v. *United States Board of Tax Appeals, supra; Yakus* v. *United States,* 321 U. S. 414, 436, 442; *Bowles* v. *Willingham,* 321 U. S. 503, 519–521. As we show below, pp. 89–90, the timing of the hearing accords fully with due process, and that being so, there is no reason why the exhaustion doctrine should not be applied. Successful pursuit of the administrative remedy would result in the Conservator's discharge and the restoration of the former management, and would thereby render the instant judicial action, which seeks no more than such relief, wholly unnecessary. The holding of the administrative hearing is therefore a necessary prerequisite to the intervention of a court of equity.

Nor may an exception be read into the exhaustion doctrine when a statutory provision is claimed to be unconstitutional *in toto,* and on its face, as appellees contend here. *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41, among other cases,[19] settles that administrative remedies must

[19] *Gorham Manufacturing Co.* v. *State Tax Commission,* 266 U. S. 265; *St. Louis-San Francisco Ry. Co.* v. *Alabama Pub. Serv. Comm.,* 279 U. S. 560; *Dalton Machine Co.* v.

be followed even though a constitutional question is raised. There the company was contending that the National Labor Relations Act could not constitutionally be applied to its operations. And this Court recently stated in *United States* v. *Ruzicka*, No. 54, this Term, decided December 16, 1946, slip sheet, p. 7, that even when questions are "formulated in constitutional terms," the administrative procedure must be followed. In *Arrow Distilleries* v. *Alexander*, 24 F. Supp. 880, 882 (D. D. C.), affirmed on other grounds, 306 U. S. 615, a three-judge district court held that although the National Labor Relations Act had been held constitutional prior to *Myers* v. *Bethlehem Shipbuilding Corp.*, "the rule applies even though the question of constitutionality is undecided." We submit that the principle is the same whether the question relates to the constitutionality of the statute as applied in a particular case (*Myers* v. *Bethlehem Shipbuilding Corp.*, *supra*) or to the constitutionality of the act as a whole (*Lawrence* v. *St. L.-S. F. Ry.*, 274 U. S. 588; *White* v. *Johnson*, 282 U. S. 367, 373; cf. *Gorham Manufacturing Co.* v. *State Tax Commission*, 266 U. S. 265), which, of course, is relevant only as it pertains to the particular case (*White* v. *Johnson*, *supra*).

Virginia, 236 U. S. 699; *McGregor* v. *Hogan*, 263 U. S. 234, 238; *First Natl. Bank* v. *Weld County*, 264 U. S. 450; *Lawrence* v. *St. L.-S. F. Ry.*, 274 U. S. 588; *White* v. *Johnson*, 282 U. S. 367, 373; cf. *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160.

In the one situation, as in the other, an administrative decision in favor of the aggrieved party will terminate the proceeding without the determination of any constitutional question. Here, if the Bank Administration, after hearing, should discharge the Conservator, the constitutionality of Section 5 (d) would be wholly immaterial so far as the appellees are concerned.[29] The reasoning of *Alma Motor Co.* v. *Timken Co.*, No. 11, this Term, decided December 9, 1946, which held that a circuit court of appeals should pass upon non-constitutional questions first in order to avoid dealing with constitutional issues unless absolutely essential to the disposition of the case, would seem even more clearly to require the courts to refrain from acting while the controversy is in the course of administrative determination. The undesirability of deciding a constitutional issue when the case may not call for it is supplemented by the recognized rule against unnecessary and premature judicial intervention in the administrative

[29] Appellees cannot, of course, excuse their failure to resort to the administrative hearing by claiming that the Administration was sure to deny relief. "In the absence of any proceeding before the Administrator we cannot assume that he would fail in the performance of any duty imposed on him by the Constitution and laws of the United States, or that he would deny due process to petitioners by 'loading the record against them' or denying such hearing as the Constitution prescribes." *Yakus* v. *United States*, 321 U. S. 414, 434. See also, *Gilchrist* v. *Interborough Co.*, 279 U. S. 159, 208–209; cf. *Highland Farms Dairy Co.* v. *Agnew*, 300 U. S. 608, 616–617.

process. The appellees cannot be legally harmed by allowing the administrative hearing to continue to conclusion since their constitutional objections are not waived by resort to administrative remedies. *St. Louis-San Francisco R. Co.* v. *Alabama Pub. Serv. Comm.*, 279 U. S. 560, 562–563; *Myers* v. *Bethlehem Shipbuilding Corp., supra.*

B. *Appellees are estopped from contesting the validity of Section 5 (d).*

The Home Owners' Loan Act, authorizing the establishment of Federal savings and loan associations and containing Section 5 (d) as it now reads, was enacted into law on June 13, 1933. In May, 1934, a group of persons (including T. A. Gregory and the present officers of Long Beach) applied to the Federal Home Loan Bank Board "for permission to organize a Federal savings and loan association" (R. 140, 146); and petitioned for a charter for such an association, averring that "they have complied in all respects with Home Owners' Loan Act of 1933 and rules and regulations of the Federal Home Loan Bank Board for the organization of a Federal savings and loan association" (R. 151), and praying that "they, their associates, and successors, be incorporated and made a body corporate * * * with all powers, privileges, and immunities, and subject to such conditions and restrictions as are provided in said act and rules and regulations made thereunder" (R. 141, 151). Pursuant to

this application and petition, a charter (known as Charter E) was issued to Long Beach on July 10, 1934, and accepted by it (R. 141). This charter contained the following provisions relevant to the instant case (R. 141, 160):

> 15. The association shall at all times be subject to the provisions of the Home Owners' Loan Act of 1933, providing for Federal savings and loan associations, and to any amendments thereof, and to any valid rules and regulations made thereunder as the same may be amended from time to time.
>
> * * * * *
>
> 19. The bylaws adopted by the association shall provide for the management of the association within the provisions of the law and this charter and the rules and regulations of the Federal Home Loan Bank Board.
>
> [redacted]. The association may be liquidated, merged, consolidated, or reorganized, as is provided in the rules and regulations for Federal savings and loan associations made by the Federal Home Loan Bank Board.

At the time of this application, and of the issuance and acceptance of the charter, the Board's regulations designating the occasions for the appointment of a conservator were in terms substantially identical to the current regulations (R. 141–143).

In April, 1937, Long Beach petitioned the Board to amend its charter by substituting a new form,

Charter K, in place of Charter E (R. 143, 162–163), and this petition was duly granted, and the amended charter issued and accepted (R. 143). Charter K provided, in part, as follows (R. 143–144, 164):

> The association shall have perpetual succession and power to sue and be sued, complain and defend in any court of law or equity; to have a corporate seal, affixed by imprint, facsimile or otherwise; to appoint officers and agents as its business shall require, and allow them suitable compensation; to have bylaws not inconsistent with the Constitution or laws of the United States, this charter, and rules and regulations of the Federal Home Loan Bank Board, providing for the management of its property and regulation and government of its affairs; to wind up and dissolve, merge, consolidate, or reorganize in the manner provided by law and rules and regulations made thereunder; and to conduct business in the territory of the United States except as otherwise limited in this charter. * * *
>
> In addition to the foregoing powers expressly enumerated, the association shall have power to do all things reasonably incident to the accomplishment of its express objects and the performance of its express powers. The association shall have such powers as are conferred by law *and shall exercise its powers in conformity with the Home Owners' Loan Act of 1933 and*

> *all laws of the United States as they now are, or as they may hereafter be amended,* and with the rules and regulations made thereunder which are not in conflict with this charter. [Italics supplied.]

At that time, the Board's regulations on the appointment of a conservator were likewise substantially identical to the current rules, except that it was provided that "before the appointment of a conservator or receiver, the Federal association will be given opportunity to be heard; provided, however, that the Board may appoint a temporary conservator pending such hearing" (R. 144–145).

It is plain from these few undeniable facts that (a) Long Beach was voluntarily organized under Section 5 of the Home Owners' Loan Act, (b) that both it and its organizers specifically agreed to accept every term of that statute, (c) that at all times Section 5 (d), as it now stands, has been a part of the Act, and the regulations have read substantially as they now read, and (d) that Long Beach has carried on its business under the Act, and subject to the Board's supervision, for over twelve years. Appellees now seek to continue operation of the Association, which would have no existence apart from Section 5, without regard to the limiting provisions of Section 5 (d). But their way is barred by the well-established rule of estoppel which denies to Long Beach, and the shareholders suing de-

rivatively on its behalf, the right to contest the constitutionality of Section 5 (d). They cannot "retain the benefits of the Act while attacking the constitutionality of one of its imporant conditions." *United States* v. *City of San Francisco,* 310 U. S. 16, 29. "The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits" (Brandeis, J., concurring in *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 348).

Every classic reason for holding litigants estopped from litigating the constitutionality of a Federal statute exists here. First, those who organized Long Beach, and those who became its shareholders, did so voluntarily, with full knowledge of the applicable statutes and regulations. The provisions appellees now attack have always been a part of the governing law, and if appellees or their predecessors in interest objected to these requirements they were entirely free to refuse to have anything to do with a Federal savings and loan association. As the Court, speaking through Mr. Justice Holmes, said of a Torrens title holder who attempted to attack certain features of the Torrens system as unconstitutional: "Even if the restrictions were of a kind that was open to constitutional objection, the appellants bought knowing them and got what they paid for, and knew that they were liable to lose their title without having parted with it and without being heard.

Even if they had been the original holders under the Torrens Act [of Illinois] and had attempted to save their supposed rights by protest the answer would be that they were under no compulsion when they came into the system, that an elaborate plan was offered of which the provisions objected to were an important part, and that they could take it as it was or let it alone." *Eliason* v. *Wilborn*, 281 U. S. 457, 459–460.

In such cases, the complaining party "is not obliged to avail himself of the privilege conferred; if he does so, he takes it with the condition attached. He cannot complain that his constitutional right has been invaded by virtue of his own voluntary act in availing himself of a conditional privilege tendered him. If he does not like the condition, he need not exercise the option." *Nuckolls* v. *United States*, 76 F. 2d 357, 360 (C. C. A. 10). To the same effect are *Electric Company* v. *Dow*, 166 U. S. 489, 490 (the party availing itself of elective damage assessment provisions of a special State condemnation statute could not attack provision adding 50% to amount of verdict; "the act confers a privilege, which the plaintiff in error was at liberty to exercise or not as it thought fit."); *Grand Rapids and Indiana Ry. Co.* v. *Osborn*, 193 U. S. 17, 29 (railroad company incorporated under Michigan incorporation law held estopped to question the statute's rate provisions); *Interstate Consolidated Street Ry. Co.* v. *Massachusetts*, 207 U. S. 79,

84 (Massachusetts street railway company bound by allegedly invalid fare provisions of law under which it was organized); *Booth Fisheries Company* v. *Industrial Commission of Wisconsin*, 271 U. S. 208 (employer electing to come under voluntary State compensation act cannot contest validity of the statute's judicial review provisions); *Pierce Oil Corp.* v. *Phoenix Ref. Co.*, 259 U. S. 125 (corporation bound by statutory requirement that it act as a common carrier, which was in force when it entered the State and secured the privilege of doing local business); *United States* v. *City and County of San Francisco*, 310 U. S. 16, 29 (city voluntarily accepting congressional statute granting lands for city water purposes cannot attack validity of a provision of the grant).[21]

[21] Lower Federal courts have applied the same principle: *American Bond and Mortgage Co.* v. *United States*, 52 F. 2d 318, 321–322 (C. C. A. 7), certiorari denied, 285 U. S. 538 (radio licensee cannot attack constitutionality of revocation provision of statute under which license granted); *North Dakota-Montana Wheat Growers' Assn.* v. *United States*, 66 F. 2d 573, 579 (C. C. A. 8), certiorari denied, 291 U. S. 672 (one accepting loans under the Agricultural Marketing Act cannot later question its validity); *Moor* v. *Texas & N. O. R. Co.*, 75 F. 2d 386, 389–390 (C. C. A. 5) (shipper availing himself of Bankhead Act to secure tax exemption certificates cannot question conditions imposed by the Act); *Baltimore and Ohio Ry. Co.* v. *Lambert Run Coal Co.*, 267 Fed. 776 (C. C. A. 4), certiorari denied, 254 U. S. 651 (coal company securing equal distribution of coal cars under statute bound by statute's limitations); *Nuckolls* v. *United States*, *supra* (taxpayer accepting privilege to defer income tax payments cannot test validity of conditions imposed on that privilege).

The only occasion for departing from this rule would be the presence of duress limiting the attacking party's real freedom to choose or reject the statutory scheme. Cf. *Union Pacific Railroad Co.* v. *Public Service Commission*, 248 U. S. 67, 70. But here such duress does not, and could not, exist. No compulsion could force a group of California citizens to form a new Federal savings and loan association under Section 5 of the Home Owners' Loan Act; there was no existing business which had to be protected by compliance with a new regulation or suffer disastrous loss, as in the *Union Pacific* case, *supra*. Long Beach's organizers desired the benefits of operating as a Federal institution under Section 5, and because they desired those benefits, they asked for a charter, fully aware of the terms of both statute and regulations.

A second, and somewhat different, formulation of the estoppel principle puts it that a party cannot first accept the privileges and benefits of a statute and later attempt to free himself from other integral, but burdensome, provisions not to his liking. *Daniels* v. *Tearney*, 102 U. S. 415, 421; *Grand Rapids & Indiana Ry. Co.* v. *Osborn*, *supra*; *Wall* v. *Parrot Silver & Copper Co.*, 244 U. S. 407, 411–412; *St. Louis Malleable Casting Co.* v. *George C. Prendergast Construction Co.*, 260 U. S. 469; *Booth Fisheries Co.* v. *Industrial Commission*, *supra*; *United States* v. *City and County of San Francisco*, *supra*; *American Bond*

& Mortgage Co. v. *United States, supra; North Dakota-Montana Wheat Growers' Assn.* v. *United States, supra; Baltimore & Ohio Ry. Co.* v. *Lambert Run Coal Co., supra; Moor* v. *Texas & N. O. Ry. Co., supra.* Appellees' pleadings are sufficient warrant of the benefits they have received from Section 5 of the Home Owners' Loan Act. Long Beach has operated and prospered as a Federal savings and loan association for over a decade (R. 5, 493). The Association and its shareholders have secured important tax exemption rights (Section 5 (h)); financial aid by the United States was available (Section 5 (g) (j)), and was actually granted (R. 532); the resources of the Federal Home Loan Banks were available (Section 5 (f)). Even now appellees seek to retain all these benefits while disowning only the effective supervision which Section 5 (d), and the regulations issued under it, place over them. The salutary rule of estoppel prevents their thus playing fast and loose with the statutory scheme they accepted as a whole in 1934.

A third statement of the rule stresses the attacking party's invocation of the statute he now assails. "It is true that one cannot in the same proceeding both assail a statute and rely upon it. *Hurley* v. *Commission of Fisheries,* 257 U. S. 223, 225." *Buck* v. *Kuykendall,* 267 U. S. 307, 316. And "it is not open to question that one who has acquired rights of property necessarily based upon a statute may not attack that statute as unconsti-

tutional * * *" *Frost* v. *Corporation Commission*, 278 U. S. 515, 527. It follows that those who have affirmatively proceeded under a statute, and still invoke its provisions to sustain their claim, must fail in singling out for invalidation only the particular statutory provisions which restrict their actions. Cases cited *supra*. See also *Shepard* v. *Barron*, 194 U. S. 553; *Wall* v. *Parrot Silver & Copper Co.*, 244 U. S. 407, 411; *United Fuels Gas Co.* v. *R. R. Commission*, 278 U. S. 300, 307–308; *North Dakota-Montana Wheat Growers' Assn.* v. *United States*, *supra*. Appellees fall squarely into this class. To succeed in the present law-suit they must rely on all the provisions of Section 5 of the Home Owners' Loan Act which give life, corporate existence, and power to Long Beach.[22] To oust the Conservator in favor of the former management, they must rest on the powers which that management secures from the charter, the regulations, and the Act, to prove that they are not interlopers. Whatever rights appellees have to secure relief must be derived from Section 5, and they have necessarily put themselves in the position of both assailing the statute and relying

[22] This reliance is shown quite neatly by the amendments to the shareholders' complaint which attempt to excuse the shareholders' failure to secure action from the Association's directors "because so to do would have been an idle act," for the reason that "if the acts, here in question [i. e. Section 5], are unconstitutional the officers and directors of said Association would not have statutory authority to act for the Association" (R. 314). See also R. 633, 643.

upon it in the same proceeding. Past invocation of, and reliance upon, the statute is, of course, indisputable, and we need not labor to pile up in detail the various affirmative steps which appellees, their predecessors, and those in whose place they stand, have taken, over the past twelve years, to secure the benefits, privileges, and immunities of the statute. Long Beach's entire existence is founded upon and entwined with the provisions of Section 5.

Finally, the special status of savings and loan associations as *quasi* public corporations in which the creating sovereign has an exceptional interest confirms the need to keep the Association to its original agreement. "Shareholders and creditors have assumed a relation to the business in the belief that the assets will be protected by all the power of the government against use for other ends than those stated in the charter," and for the Government "there is thus the duty of the *parens patriae* to keep faith with those who have put their trust in the parental power." *Hopkins Federal Savings & Loan Assn.* v. *Cleary*, 296 U. S. 315, 340. To permit the Association to free itself from the bonds of Section 5 (d), on which the Government's power to enforce its supervisory authority mainly rests, would be to break faith with those who invested in or dealt with the Association in the belief that the statute, the charter, and the regulations meant what they said.

C. *The District Court's lack of jurisdiction over Fahey prevented the granting of much, if not all, of the relief against appellants*

1. THE DISTRICT COURT DID NOT HAVE JURISDICTION OVER FAHEY

The lower court did not have jurisdiction of appellant Fahey, and could not validly enter any order or decree against him. Fahey was admittedly never served in California (R. 20–21, 43), he never voluntarily appeared in the action (R. 43, 260), and his official residence is in the District of Columbia (R. 261). Under the rules normally applicable to district court actions, suit was not properly brought against Fahey in the Southern District of California, and that court did not obtain jurisdiction over him. Judicial Code, Section 51, 28 U. S. C. 112; *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, 622–623; *Transcontinental* v. *Western Air, Inc.* v. *Farley*, 71 F. 2d 288, 291–292 (C. C. A. 2), certiorari denied, 293 U. S. 603; *Howard* v. *United States ex rel. Alexander*, 126 F. 2d 667 (C. C. A. 10), certiorari denied, 316 U. S. 699.

a. Attempt is made, however, to rest jurisdiction over Fahey on Judicial Code, Section 57, 28 U. S. C. 118, which provides, in pertinent part, as follows:

> When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim

to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appear-

> ance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same State, such suit may be brought in either district in said State. * * *

This section is plainly inapplicable to the present action to enjoin officials of the Federal Home Loan Bank Administration from holding an administrative hearing, from merging Long Beach, and from continuing to operate it on behalf of the Administration. "Obviously the section is confined to suits which are local in the sense of relating directly to specific property, real or personal, within the district of suit or partly therein and partly in another district of the same State." *General Investment Co.* v. *Lake Shore & M. S. Ry. Co.*, 260 U. S. 261, 280. For the statute to apply, the main gist and burden of the action must seek relief against property within the district, and not *in personam* judgments against the defendants. *General Investment Co.* v. *Lake Shore & M. S. Ry. Co., supra*; *Findlay* v. *Florida East Coast Ry. Co.*, 68 F. 2d 540, 542 (C. C. A. 5), certiorari denied, 292 U. S. 623; *Wilhelm* v. *Consolidated Oil Corp.*, 84 F. 2d 739, 745–746 (C. C. A. 10); *Dan Cohen Realty Co.* v. *National Savings & Trust Co.*, 125 F. 2d 288, 290 (C. C. A. 6);

Moore & Friedman, *Moore's Federal Practice*, p. 345. The fact that the action concerns or grows out of property located within the district is never decisive. *Ladew* v. *Tennessee Copper Co.*, 218 U. S. 357; *Spellman* v. *Sullivian*, 43 F. 2d 762, 764 (S. D. N. Y.).

The property and assets of Long Beach are admittedly within the territorial jurisdiction of the lower court, but the crux of the relief sought is not against that property, but personal decrees against appellants Fahey and Ammann. Appellees' prayers are for (a) injunctions against merger of Long Beach, against the holding of an administrative hearing, and against further operation of Long Beach by appellants, (b) a mandatory injunction requiring appellants to turn over the Association's property and assets, and (c) an accounting "for all moneys and for income of all kinds" received by appellants.

The attempt to apply Section 57 rests on the false premise that by the appointment of a conservator, the assets and property of the Association were transferred from it to the conservator. But it is apparent from the statute and the regulations that a duly appointed conservator, unlike a receiver, does not take title to the Association or its assets. See Regulations, Section 206.4, *infra*, pp. 115–116. Whether under the management of its officers or of a conservator, title to the Association's assets remains in the Association.

And because a Federal savings and loan association is mutual and cooperative, it is at all times owned by its shareholders (Kress, *Introduction to the Cooperative Movement* (1941), p. 277). There has, therefore, been no change in title, ownership, or possession of property. There has been no more than a change in the trusteeship, in management; in brief, only a change in personnel of those acting for the Association.

Moreover, the action is clearly not one to enforce a "lien," nor can the order appointing the conservator be said to be an "incumbrance" or "cloud upon the title" to the Association's property which appellees are seeking to remove. *Devine* v. *City of Los Angeles*, 202 U. S. 313, 335; *Appalachian Electric Power Co.* v. *Smith*, 67 F. 2d 451, 455 (C. C. A. 4). As in the *Devine* case, the "assertion of unconstitutionality cannot be resorted to to maintain Federal jurisdiction as constituting a cloud. The averment of unconstitutionality in such circumstances is a mere pretext to obtain that jurisdiction" (p. 335). Likewise, appellees' suit cannot be classified as primarily one to enforce a "claim to * * * real or personal property," since the main relief requested and granted is injunctive relief running against appellants personally.

The instant case is no more within the purview of Section 57 than have been those cases refusing extra-district service where plaintiffs sought to enjoin two railroad companies from consolidating

(*General Investment Co.* v. *Lake Shore & M. S. Ry. Co., supra,* at 280); to enjoin the destruction of plaintiffs' forests by the discharge of deleterious fumes and gases from the defendants' works (*Ladew* v. *Tennessee Copper Co., supra.*, affirming 179 Fed. 245 (C. C. S. D. Tenn.)); to enforce payment of a debt out of specific property and for an accounting (*Vidal* v. *South America Securities Co.*, 276 Fed. 855, 873 (C. C. A. 2)); to rescind a purchase of land and recover the purchase money because of the fraud of seller and agent (*Camp* v. *Bonsal*, 203 Fed. 913, 915 (C. C. A. 4)); to compel trustees of a residuary trust estate, which included ownership of a railroad, to afford the railroad company assistance from the trust funds (*Findlay* v. *Florida East Coast Ry. Co., supra,* at 542); to rescind and cancel an agreement of corporate consolidation, and the conveyances and transfers of property made pursuant thereto (*Wilhelm* v. *Consolidated Oil Corp., supra,* at 745–746); or where plaintiff sought to compel specific performance of a contract to make a lease on land within the district (*Dan Cohen Realty Co.* v. *National Savings & Trust Co., supra*). In each of these cases, plaintiff's action was directly connected with property within the jurisdiction of the court, but resort to Section 57 was denied because, as here, the main relief sought was not a determination of rights in the property, but a personal decree requiring the defendants to take,

or abstain from taking, certain allegedly harmful action involving the property. For the same reason, the lower court should have denied appellees' petition for out-of-state service on Fahey.

b. Even if the action be held properly within Section 57, and service on Fahey in the District of Columbia sufficient "for the court to entertain jurisdiction," the District Court was not authorized to enter any personal decrees against Fahey. The statute itself provides that the court's "adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district." Out-of-state service under the section may serve to bind a defendant as to adjudged rights in the affected property, but it does not empower the court to award an injunction, an accounting, or any other relief sounding *in personam*. *Clarke* v. *Boysen*, 39 F. 2d 800, 815 (C. C. A. 10), certiorari denied, 282 U. S. 869; *Wilhelm* v. *Consolidated Oil Corp.*, *supra*; *McQuillen* v. *Dillon*, 98 F. 2d 726, 729 (C. C. A. 2); *McQuillen* v. *National Cash Register Co.*, 112 F. 2d 877, 881 (C. C. A. 4), certiorari denied, 311 U. S. 695; *Dan Cohen Realty Co.* v. *National Savings & Trust Co.*, *supra*. Accordingly, assuming *arguendo* that the decree was otherwise proper, the lower court erred in those portions of its decree which direct personal action

by Fahey,[24] and at least as to those portions of the decree reversible error was committed.[24]

2. FAHEY IS AN INDISPENSABLE PARTY TO THE GRANTING OF MUCH, IF NOT ALL, OF THE RELIEF SECURED BY APPELLEES

a. At least as to the injunctions against merger, and against holding an administrative hearing,[25]

[23] The decree orders Fahey (1) not to merge or consolidate Long Beach, (2) not to hold an administrative hearing, (3) to deliver all of the Association's property to the old officers, (4) to render an inventory of the Association's property, (5) to render an accounting, (6) not to assert any claim to the Association's property, (7) to produce the conservator's bond, and (8) to "do and perform such acts as are necessary or expedient to carry out the provisions hereof." (R. 496–500). Costs were also awarded against appellant Fahey (R. 499).

[24] This conclusion is not changed by the fact that Fahey, individually and as Commissioner, was also served with process in the District of Columbia, issued pursuant to an order of the court below (R. 48–53, 64–67), at the request of appellees Title Service Company and Robert H. Wallis, the purported cross-claimants in interpleader who deposited money into court, under Judicial Code, Section 24 (26), 28 U. S. C. 41 (26). Such service, even if valid for the purpose of determining claims to the property deposited in the registry of the court by the cross-claimants, did not bring Fahey within the court's jurisdiction for the purpose of granting the personal relief requested in the original complaint. *Stitzel-Weller Distillery, Inc. v. Norman*, 39 F. Supp. 182, 188 (W. D. Ky.). Moreover, as we shall later show, the alleged interpleaders were improperly granted, and the District Court did not obtain jurisdiction over Fahey even for the limited purpose of the alleged cross-claims in interpleader. See *infra*, pp. 95–99.

[25] This was the only relief appellees actually moved the three-judge court to grant, and the only relief requested by appellees on which that court held its hearing (R. 491–492; *supra*, pp. 14–15; *infra*, pp. 90–95):

Fahey is an indispensable party, and personal jurisdiction over him not having been obtained, it was error to grant such relief. Section 5 of the Home Owners' Loan Act, and the implementing regulations, make it clear that the conservator has no part either in the merging of an association or in the holding of an administrative hearing. Section 5 (d) provides that the *Board* "shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations. * * *" At present, the regulations provide only for voluntary mergers by associations, or for involuntary mergers by *receivers;* in both cases, approval of the Commissioner is required. Sections 204.1 (b), 208.4. Nothing in the regulations allots any duties, powers, or functions concerning merger to a conservator. For an injunction against merger to be effective it would have to be directed against Fahey, and an injunction against Ammann alone would be both futile and improper, since he possesses no authority or functions in this sphere.

Fahey is also clearly an indispensable party to that part of the action praying for an injunction to restrain an administrative hearing on the appointment of the conservator. Section 206.2 of the regulations, *infra,* p. 114, provides that the Bank Administration shall grant and conduct a

hearing if requested by the Association. Ammann, as conservator, has no power or duties in connection with such a hearing; none are shown by the statute or by regulation, and none are alleged in the pleadings. Hence, it is apparent that Fahey, as Commissioner of the Bank Administration, is the sole necessary or proper party to any proceeding seeking to restrain such a hearing, and an injunction directed against Ammann alone would be useless and improper.

b. The indispensability of Fahey's presence as a party is less clear as to the portions of the decree enjoining Ammann from continuing to operate Long Beach, and requiring him to return the Association to the old officers. This part of the decree rests solely on the lower court's conclusion that Section 5 (d) is unconstitutional, and the order appointing the conservator necessarily invalid as a matter of law. As the Court has stated (*Brooks* v. *Dewar*, 313 U. S. 354, 359), the necessity of joining the superior in such an action against a local subordinate is a matter of widely conflicting decision.[20] If it is held that

[20] Compare *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28; *Oklerich* v. *Rutter*, 263 U. S. 388; *Webster* v. *Fall*, 266 U. S. 507; *National Conference on Legalizing Lotteries, Inc.*, v. *Goldman*, 85 F. 2d 66 (C. C. A. 2); *Chamberlain* v. *Lemback*, 18 F. 2d 408 (C. C. A. 3); *Doran* v. *Charles D. Kaier Co.*, 60 F. 2d 259 (C. C. A. 3); *Ainsworth* v. *Barn Ballroom Co.*, 157 F. 2d 97 (C. C. A. 4); *Jump* v. *Ellis*, 100 F. 2d 130 (C. C. A. 10), certiorari denied, 306 U. S. 645 (all holding

extra-state service under Section 57 of the Judicial Code gave the lower court jurisdiction over Fahey for the purposes of adjudication affecting Long Beach's property, the issue of his indispensability to the granting of relief ousting Ammann from possession is not presented. If the Court holds, as we urge, that no jurisdiction over Fahey has been obtained for any purpose, the question of his indispensability is before the Court. We submit that the correct ruling, in this instance, is that the Commissioner must be joined and that the action must fail for non-joinder, but we shall not argue the point,[27] since we believe that the District Court committed several more fundamental errors, and appellees' claims should be dismissed for weightier reasons.

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superior an indispensable party), with *Colorado* v. *Toll*, 268 U. S. 228; *Jarvis* v. *Shackleton Inhaler Co.*, 136 F. 2d 116 (C. C. A. 6); *Varney* v. *Warehime*, 147 F. 2d 238 (C. C. A. 6), certiorari denied, 325 U. S. 882; *Greer* v. *Cline*, 148 F. 2d 380 (C. C. A. 6); *Rood* v. *Goodman*, 83 F. 2d 28 (C. C. A. 5), certiorari denied, 299 U. S. 551; *Ryan* v. *Amazon Petroleum Corp.*, 71 F. 2d 1 (C. C. A. 5), reversed on other grounds, 293 U. S. 388; and *Yarnell* v. *Hillsborough Packing Co.*, 70 F. 2d 435 (C. C. A. 5) (holding presence of superior to be unnecessary). *Neher* v. *Harwood*, 128 F. 2d 846, 849 (C. C. A. 9), certiorari denied, 317 U. S. 659 holds the superior an indispensable party except where, as here, the constitutionality of the statute authorizing the administrative action is assailed.

[27] The Brief for the Petitioner, in *Brooks* v. *Dewar*, No. 718, October Term, 1940, pp. 27-35, contains an extended discussion of the question of the indispensability of the superior officer.

II

SECTION 5 (D) OF THE HOME OWNERS' LOAN ACT IS CONSTITUTIONAL

The lower court held that Section 5 (d) of the Home Owners' Loan Act of 1933, authorizing the appointment of a conservator, was "unconstitutional and void as attempting to delegate legislative power to the Federal Home Loan Bank Board." The section, the court said, is (R. 377):

> "brief and unambiguous." It makes no attempt to lay down rules for the guidance of the Board, nor does it state in what circumstances or under what conditions the Board is to merge institutions or appoint a conservator or receiver. It establishes no criterion to govern the board's course. It does not require any finding by the board as a condition of its action. No policy is declared by Congress as to merger or appointment of conservator. The section gives to the board unlimited authority to formulate rules for the board's action in the respects mentioned and to do so as it may see fit. The only restrictions on those powers were to be such as the board might choose to put upon itself in the rules and regulations which it, the board, adopted to govern itself. We are unable to find in the Act a declaration of policy or standard of action which can be deemed to relate to the subject of section 5 (d).

Since it invalidated Section 5 (d) as a whole, the court did not pass upon or consider the regulations issued thereunder.

A. *Detailed standards guiding administrative action are provided expressly and by implication.*

1. *Appointment of a Conservator:* The lower court's sweeping condemnation of Section 5 (d) (Cf. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 415), in terms more fitting for broad general legislation such as the National Industrial Recovery Act, seems somewhat extravagant in the face of the narrow reach of the statute. Under Section 5 (d), the Bank Administration's authority is limited to Federal savings and loan associations; the disputed administrative action authorized by Congress is the restricted one of "power to appoint a conservator or a receiver to take charge of the affairs of any such association." The field of administrative operation is necessarily confined within this framework, and the range of discretion necessarily limited. No question is raised of vagueness, indefiniteness, or undue breadth in the substance of the power, i. e. the appointment of a conservator. The sole question concerns the occasions for its use: whether Congress has sufficiently indicated to the Bank Administration the standards and policy which should govern the administrative use of this single definite power to appoint a conservator or receiver.

The District Court blinded itself to the plentiful guides to administrative action furnished, explicitly and implicitly, by the Home Owners' Loan Act of 1933, and related statutes. The basic factors to be considered need not be specifically named within the four corners of Section 5 (d). It is enough if they may be gathered from that section, other portions of the statute, or related acts, or if they are otherwise disclosed by "the history of the act and its proper construction." *Buttfield* v. *Stranahan*, 192 U. S. 470, 494–496; *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24–25; *American Power & Light Co.* v. *Securities and Exchange Commission*, Nos. 4 and 5, this Term, decided November 25, 1946, slip opinion, p. 10; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 416; *The Intermountain Rate Cases*, 234 U. S. 476, 487–488. In our view, there are at least the following sources from which adequate guides to administrative action under Section 5 (d) are to be drawn: (a) the meaning and connotation of the words "conservator" and "receiver"; (b) the body of judicial equity decisions on appointment of receivers and conservators; (c) the rules governing the appointment of receivers, conservators, or liquidators for state-regulated building and loan associations, and similar institutions; (d) general and special standards established in the provisions of Section 5 and related statutes; and (e) the history of the times and the forces im-

pelling the establishment of Federal savings and loan associations, and the nature and history of mutual loan associations.

a. *Meaning of "conservator":* Section 5 (d) empowers the Administration to provide for the "reorganization, consolidation, merger, or liquidation" of Federal savings and loan associations, specifically including "the power to appoint a conservator or a receiver to take charge of the affairs of any such association * * * and to release any such association from such control and permit its further operation." This section obviously envisages temporary control of an association, in connection with its reorganization, consolidation, merger, or liquidation, by an official appointed by the Administrator. The general purposes for which, and the occasions on which, such an official may be appointed are largely inferrable from the terms by which Congress has described him: "receiver" and "conservator."

(1) A conservator, according to Webster's New International Dictionary, is "one who preserves from injury or violation; a protector; a preserver."[*] More specifically, it may be "a person, official, or institution designated, as by a court, to take over and protect the interests of an incompetent, as a minor child, an insane per-

[*] The Oxford English Dictionary's definition is: "One who preserves from injury; a preserver; guardian, keeper, custodian."

son, a convict, etc.," or the term may designate "any of various officials charged with the protection of something, as of the peace, riverbanks, fisheries, etc." The core of the concept of conservation is obviously the preservation of something from destruction, injury, or dissipation, and, in the case of human beings or human institutions, the assumption is that the object of the conservation is unable to perform the functions of self protection. A conservator is one who undertakes such a protective function on behalf of another.

The legal usage of the term conforms to this common understanding. Revenue Acts have long included the term, in the general definition of "fiduciary" for tax purposes, along with other persons "acting in any fiduciary capacity for any person." Internal Revenue Code, Sec. 3797, 26 U. S. C. 3797. Other statutes speak of a "receiver, conservator, liquidator, liquidating agent, or similar official" of a bank or financial institution (Investment Company Act of 1940, Sec. 3, 15 U. S. C. 80a–3 (c) (3)); of "a receiver, conservator, or other liquidating agent" of a bank (Securities Exchange Act of 1934, Sec. 3, 15 U. S. C. 78c (a) (6)); of "the capacity of executor, administrator, testamentary or inter vivos trustee, guardian, committee or conservator, or in any other similar capacity." (Trust Indenture Act of 1939, Sec. 310, 15 U. S. C. 77 jjj (b) (9)).

(2) It is in the field of bank regulation that the institution of the conservator has been most used in recent years. The parent of Section 5 (d) of the Home Owners' Loan Act is, in all probability, Section 203 of the Bank Conservation Act of March 9, 1933, ch. 1, 48 Stat. 2, 12 U. S. C. 203, passed in the emergency days of March 1933 by the Congress which established Federal savings and loan associations a few months later. Section 203 [29] authorized the Comptroller of the Currency, "whenever he shall deem it necessary in

[29] Section 203 provides:

"Whenever he shall deem it necessary in order to conserve the assets of any bank for the benefit of the depositors and other creditors thereof, the Comptroller of the Currency may appoint a conservator for such bank and require of him such bond and security as the Comptroller of the Currency deems proper. The conservator, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such bank, and take such action as may be necessary to conserve the assets of such bank pending further disposition of its business as provided by law. Such conservator shall have all the rights, powers, and privileges now possessed by or hereafter given receivers of insolvent national banks and shall be subject to the obligations and penalties, not inconsistent with the provisions of this title, to which receivers are now or may hereafter become subject. During the time that such conservator remains in possession of such bank, the rights of all parties with respect thereto shall, subject to the other provisions of this title, be the same as if a receiver had been appointed therefor. All expenses of any such conservatorship shall be paid out of the assets of such bank and shall be a lien thereon which shall be prior to any other lien provided by this Act or otherwise. The conservator shall receive as salary an amount no greater than that paid to employees of the Federal Government for similar services."

order to conserve the assets of any [national] bank for the benefit of the depositors and other creditors thereof," to appoint a "conservator for such bank." Under the Comptroller's direction, the conservator is to take possession of the bank "and take such action as may be necessary to conserve the assets of such bank pending further disposition of its business as provided by law."[30] The purpose of this act was "to enable the Comptroller to appoint conservators rather than receivers where, in his judgment, there was a prospect that the bank of which a conservator should be appointed might, under his direction and control, later reopen and resume its corporate functions." *Davis Trust Co.* v. *Hardee*, 85 F. 2d 571, 572 (App. D. C.). The conservator's appointment is the "equivalent of the appointment of a receiver of a corporation with leave to continue the business and quite similar to the appointment of a trustee in a proceeding for the reorganization of a corporation under the Bankruptcy Act, 11 U. S. C. A. § 207." *Smith* v. *Witherow*, 102 F. 2d 638, 642 (C. C. A. 3). The validity of the provision has been expressly upheld. *Smith* v. *Witherow, supra.*

In Section 203 Congress thus spelled out the implications normally inherent in the concept of a "conservator". It is entirely reasonable to

[30] Webster's New International Dictionary gives the following as one of its definitions of "conservator": "a person placed by the Secretary of the Treasury in charge of a national bank whose affairs are not in a satisfactory condition."

assume that Congress, when it summarily authorized the Federal Home Bank Board to establish rules and regulations for the appointment of a conservator to take charge of the affairs of a Federal savings and loan association, had in mind this recent invention[31] of the appointment of a conservator to conserve the assets of national banks for the benefit of depositors and other creditors, and intended the word "conservator," in Section 5 of the Home Owners' Loan Act, to refer the Board to the general directives on the appointment of conservators which it had spelled out, three months earlier, for the Comptroller of the Currency, in so far as those directives were appropriate for a mutual building and loan association.[32]

Some further light on Congressional understanding of the place and function of a conservator is shed by provisions of two other statutes enacted by the Congress which passed the Home Owners' Loan Act. The Banking Act of 1933 (Act of June 16, 1933, ch. 89, Sec. 31, 48 Stat. 162, 194, 12 U. S. C. 71a), authorized the Comptroller of the Currency to appoint a receiver or

[31] Westerfield, *Money, Credit and Banking* (1938), p. 409, credits the Emergency Banking Act of March 9, 1933, with inventing the conservator as "a new method of handling banks in financial difficulty."

[32] The legislative history of the Home Owners' Loan Act throws no direct light on the issue of delegation of authority to the Board. See H. Rept. No. 55, 73rd Cong., 1st Sess.; S. Rept. No. 91, 73rd Cong., 1st Sess.; H. Rept. No. 210, 73rd Cong., 1st Sess. (Conference Report); H. Doc. No. 19, 73rd Cong., 1st Sess. (President's message).

conservator for any national bank or member bank of the Federal Reserve System which violated the requirement that such institutions have from five to twenty-five directors. The National Housing Act (Act of June 27, 1934, ch. 847, Sec. 406, 48 Stat. 1246, 1259, 12 U. S. C. 1729) empowered the Federal Savings and Loan Insurance Corporation to act as conservator or receiver for defaulting savings and loan associations and other insured institutions, and authorized the corporation, as such conservator or receiver "(1) to take over the assets of and operate such association, (2) to take such action as may be necessary to put it in a sound and solvent condition, (3) to merge it with another insured institution, (4) to organize a new Federal savings and loan association to take over its assets, or (5) to proceed to liquidate its assets in an orderly manner, whichever shall appear to be to the best interests of the insured members of the association in default * * *"[33]

[33] The National Housing Act of June 27, 1934, c. 847, Sec. 306, 48 Stat. 1246, 1255, 12 U. S. C. 1721, in setting up National Mortgage Associations, followed Section 5 (d) of the Home Owners' Loan Act of 1933 in providing that the Federal Housing Administration "shall have power to provide by rules and regulations for the liquidation, reorganization, consolidation, or merger of national mortgage associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, to require an equitable readjustment of its capital structure, to release it from the control of a conservator or receiver, and to permit its further operation."

(8) Thus: the term "conservator," both as used in day-to-day speech and by Congress in dealing with banking institutions, carries within itself criteria and guides for the appointment of such an official. Reading the normal connotation of the term together with recent Congressional use, it is not difficult to cull important factors which the Bank Administration should consider in determining the proper occasions for designation of a conservator: Violation by the association of basic provisions of statute or charter; need to conserve the institution's assets in order to protect shareholders and other creditors from loss; threat of insolvency; actual insolvency; unsound or unsafe operation leading to dissipation of assets or other injury to shareholders and creditors; incompetency, fraud, or recklessness of management. Such standards could hardly be deemed insufficient, especially to those familiar with the history and needs of mutual loan and building institutions. Cf. *American Power & Light Company* v. *Securities and Exchange Commission*, Nos. 4 and 5, this Term, decided November 25, 1946, slip opinion, p. 10; see *infra*, pp. 78–79, 81–84.

b. *Equity receivership doctrines:* A second source of direction for the Bank Administration in appointing conservators and receivers is found in the large body of judicial doctrine, substantially non-statutory in origin, developed by the courts, Federal and state, to govern the appointment of receivers, conservators, or liquidators. See 1

Clark, *A Treatise on the Law and Practice of Receivers*, (2d ed. 1929), Sec. 46 (a) (Court Appointing Receiver under General Equitable Powers), Sec. 46 (c) (Federal Courts' Inherent Power to Appoint), Sec. 49 (Rules Governing Appointment of Receiver), Sec. 53 (Appointment Discretionary with the Court); 2 Clark, *supra*, Sec. 702 (Federal Courts Appointing Receivers of Corporations), Sec. 747 (Grounds for Appointment of Receiver in Stockholders' Suits), Sec. 908 (Appointment of Receiver of Building and Loan Associations); cf. *Dodge v. Woolsey*, 18 How. 331, 341–344; *Buxrite Coal Co. v. Riggs*, 274 U. S. 208, 212. A statute which implicitly refers an administrator to such a well-developed body of common-law doctrine contains sufficiently precise standards and markers.[*] If Section 5 (d) had merely authorized the Bank Administration to apply to a court of competent jurisdiction for the appointment of a receiver or conservator, we have no doubt that neither appellees nor the District Court would have seen any constitutional objection.[**] No claim of unlawful delegation of

[*] In part, the Federal Trade Commission must draw upon the common law of unfair competition in determining what constitutes "unfair methods of competition." Cf. *Federal Trade Commission v. Gratz*, 253 U. S. 421; *Federal Trade Commission v. R. F. Keppel & Bro.*, 291 U. S. 304.

[**] Appellees suggested, in the lower court, that if Section 5 (d) were held unconstitutional the Bank Administration could and should apply to the District Court for the appointment of a receiver or conservator, if it was believed that Long Beach's officers were carrying on its affairs improperly (R. 648–649).

legislative power would have been made. But it should not taint the statute with invalidity that in this instance Congress vested the authority in an administrative official rather than a court. At the very least, the guides to action which would exist for a court would likewise be present to govern the administrator's order. Cf. *Intermountain Rate Cases*, 234 U. S. 476, 486–489 (transfer of rate authority from carriers to I. C. C.).

c. State rules on appointment of conservators: The state rules governing the appointment of receivers, conservators, or liquidators of state-regulated building and loan associations also provide an extensive and detailed system of guidance and control for the administrators of Section 5 (d). And Congress has expressly referred the Bank Administration to these state rules by its statutory direction that "primary consideration" is to be given "to the best practices of local mutual thrift and home-financing institutions in the United States." Section 5 (a). In many states, legislation designates the occasions upon which the state supervising official may take possession of an institution, or upon which he may apply for judicial appointment of a conservator, receiver, or liquidator; in others, judicial decisions—largely based on equity receivership doctrines—have elaborated the applicable rules. See *Sundheim, Law of Building and Loan Associations* (3rd ed., 1933), Secs. 190–191, and Appendix. There is a large

measure of agreement on the reasons which authorize ousting of the management of an association, although the statutory language may vary; and this uniformity of view is in itself the clearest sign of the constitutional adequacy of reference to the rules and practices governing local institutions. This reference designates the general policy and marks the general outlines of action; within that framework, the formulation of particular operative rules, the choice of language, and the selection of subsidiary standards is left to the Administration. But "it is no objection that the determination of facts and inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework." *Yakus* v. *United States,* 321 U. S. 414, 425.

A cumulative listing of various occasions sanctioned by state law for the vesting of control of a savings and loan association in a state official, receiver, or conservator will demonstrate that a general consensus exists, and that the Bank Administration's regulations fall squarely within this uniformity of view. Grounds for removal of the management and taking possession of an institution are:

(a) insolvency;
(b) impairment of capital;

(c) violation of charter, by-laws, or of law, by the institution; the institution is exceeding its statutory authority;

(d) the institution is conducting its business in an unauthorized or unsafe manner, or "in an unsafe or injurious manner such as to render its further proceeding hazardous to the public or to any or all of its investors"; the institution's affairs are in an "unsafe condition," or an "unsound or unsafe" condition; business is being conducted in a "fraudulent, illegal, discriminatory, or unsafe manner"; the institution is practicing deception on its members; the institution "cannot with safety and expediency continue business"; the institution's condition or methods of business are such as to render the continuation of its operations hazardous to the public or those having funds in its custody; it would be unsafe and inexpedient for the association to continue in business; its affairs are not being conducted for the best interests of its depositors, shareholders, or creditors;

(e) the institution has suspended payment of its obligations, or failed to pay them for a stated period;

(f) the institution has neglected or refused to comply with the terms of a duly issued order of the state supervisory official;

(g) the institution has refused to submit records and affairs for inspection and examination;

(h) an officer of the institution has refused to be examined under oath regarding its affairs.

See New York Banking Law, Sec. 606; Page's Ohio General Code Ann., Sec. 687; Deering's General Laws of the State of California, Act 986, Sec. 13.11; Gen. Laws, Mass., Chap. 167, Sec. 22; Chap. 170B; Jones' Ill. Stat. Ann., Sec. 14.40; *Bettle* v. *Republic Savings and Loan Assn.*, 63 N. J. Eq. 578 (Ct. Ch.) (N. J. Laws of 1899, p. 366); *Union Savings and Investment Co.* v. *District Court*, 44 Utah 397, 402 (Utah Act of 1907); *State ex rel. Tanner* v. *Northwestern Inv. Co.*, 70 Wash. 381; Sundheim, *supra*, Secs. 190–191 and Appendix.* Some of these statutes providing for appointment of conservators or similar officials go back to the latter part of the 19th century and the early years of the present century. During the 20th century there has been further elaboration; and by 1933, when the Home Owners' Loan Act was adopted, an entire corpus of law existed on this subject. Contemporaneous with the Home Owners' Loan Act, and since that time, there have been further changes and development of details. Thus, a definite group of standards, subsidiary policies, and rules has been and continues to be available to the Bank Administration. The con-

* The provisions of the New York, California, Massachusetts, and certain other state statutes are reprinted in Appendix C, *infra*, p. 120.

stitutional adequacy of these detailed standards is hardly open to question. They have been upheld by several state courts. See *People ex rel. Barrett* v. *The Logan County Bldg. & Loan Assn.*, 369 Ill. 518, 527–530; *Veix* v. *Seneca Bldg. and Loan Assn.*, 126 N. J. L. 314, 321–323; *State ex rel. Bettman* v. *Court of Common Pleas*, 124 Ohio St. 269.

The Administration has actually followed these state rules very closely, as a comparison of Section 206.1 of its Regulations (*infra*, pp. 111–112) with the foregoing resumé makes clear. Each of the ten reasons for the appointment of a receiver or conservator which is set out in Section 206.1 will be found, in substantially identical or very similar wording, in the list given above. In their entirety, the Bank Administration's list conforms very closely to the provisions of at least the New York, California, Indiana, and Massachusetts statutes.[37]

d. *Express statutory standards:* We have discussed the provisions of Section 5 (d) as if they stood alone, and have argued that in themselves they import sufficient standards for administrative action; but they "need not be tested in isolation. They derive much meaningful content from the purpose of the Act, its factual back-

[37] We have not attempted to collate the applicable law of all 48 states, and the Administration's regulations may also conform to the provisions of other state statutes. See Appendix C, *infra*, pp. 120–126.

ground, and the statutory context in which they appear." *American Power & Light Co.* v. *Securities and Exchange Commission,* this Term, Nos. 4 and 5, decided November 25, 1946, slip opinion, p. 10.

Section 5 of the Home Owners' Loan Act is an integrated statutory unit providing for the establishment of Federal savings and loan associations, and laying down certain specific rules for the government of these associations. Section 5 (a) provides that such associations shall be mutual thrift associations in which people may invest their funds, and in order to provide for the financing of homes; (b) provides the method by which an association shall raise its capital; (c) provides that it shall lend its funds only on first mortgages on homes, or combination of homes and business property in an amount in each case not to exceed $20,000, with certain designated exceptions; (d) provides for rules and regulations concerning reorganization, consolidation, merger, or liquidation; (e) provides that no charter shall be granted except to persons of good character and responsibility and only where in the board's judgment a necessity exists for the institution in the community and where there is a reasonable probability of its usefulness and success; (f) provides that each association upon its incorporation shall automatically become a member of the Federal Home Loan Bank in its

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district and shall qualify as such; (g) provides for subscriptions for preferred shares by the Secretary of the Treasury; (h) exempts the associations from taxation by the United States; (k) provides that an association shall act as a fiscal agent of the United States when designated by the Secretary of the Treasury; Section 6 appropriates public funds to carry out the purposes of the Act.

These individual provisions, separately and in their interrelationship, exhibit much evidence of legislative policy as to the government of these savings associations. In addition, several general policies are set forth in the section, or incorporated by reference, which inform and guide the use of all of the specific authorizations. In subsection (a), Congress first announced that the purpose of the establishment of these associations is the provision of "local mutual thrift institutions in which people may invest their funds," and secondly the Board is directed, in issuing charters for and in providing for the organization, incorporation, examination, operation and regulation of these associations, to give "primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." Another general guide, contained in subsection (e), requires that charters be granted only to "persons of good character and responsibility," and only if "in the judgment of the Board a necessity exists for such an institution in the

community to be served" and "there is a reasonable probability of its usefulness and success."

Section 5 (f) requires each Federal savings and loan association to become a member of the Federal Home Loan Bank of its district, and to "qualify for such membership in the manner provided in the Federal Home Loan Bank Act with respect to other members." These provisions incorporate the eligibility requirements set forth in Section 4 (a) of the Federal Home Loan Bank Act which foreclose from membership any institution if "its financial condition is such that advances may not safely be made to such institution or the character of its management or its home-financing policy is inconsistent with sound and economical home financing, or with the purposes of this Act." Similarly, the National Housing Act, adopted in June 1934, makes it mandatory for Federal associations to qualify for insurance by the Federal Savings and Loan Insurance Corporation. The requirements are unimpaired capital, safe financial policies and management, and a financial policy and management consistent with economical home financing and the purposes of that Act. These two provisions (concerning insurance by the Federal Savings and Loan Insurance Corporation and membership in the Federal Home Loan Bank) must be read as if directly incorporated into Section 5, not only because they impose requirements on Federal savings and loan associations and therefore establish Federal policy

as to their regulation, but also because, on the subject of Federal savings and loan associations; the acts are *in pari materia* in the strictest sense. *United States* v. *Stewart*, 311 U. S. 60, 64.

From these standards alone, a "veritable code of rules reveals itself" for the Bank Administration to follow in giving effect to Section 5 (d). Cf. *American Power & Light Co.* v. *Securities and Exchange Commission*, *supra*, slip opinion, p. 10. In appointing a conservator, these provisions direct that regard be had to (a) the "best practices" of State and local savings and loan associations, (b) the character and responsibility of the management of the association, (c) the usefulness and success of the association in its community, (d) the safety of the institution from the investor's point of view, (e) the consistency of the association's management and home-financing policy with sound and economical home financing, (f) the safety of the general financing condition, management, and policies, (g) actual or potential impairment of capital. Especially fruitful is the direction to consider the best practices of State and local mutual thrift and home-financing institutions. As we have shown above, *supra*, pp. 68–72, the State rules governing the appointment of receivers, conservators, and liquidators furnish a definite and rich source of guidance.

c. *Background of the Act; nature of savings and loan associations:* Finally, the norms which

control the Administration, in action under Section 5 (d), can be gathered from the reasons impelling the creation of Federal savings and loan associations, and the purposes Congress sought to accomplish. The Court will take judicial notice of matters within common knowledge, that at the time the Act was under consideration by Congress the building and loan industry had undergone financial debacles several times. The prevention of the recurrence of such a debacle, in so far as it was possible, and with it the wrecking of the Federal Home Loan Bank System, was one of the patent purposes of Congress in creating the Federal savings and loan system. Congress well knew, as all knew, that the creation of a sound savings and loan system demanded the elimination of questionable and unsafe practices: promotional real estate practices, inflated appraisals, speculative loans and unsound investments, use of the associations for the personal benefit of the management, haphazard supervision and other dangerous and unsafe practices. It was in the light of those facts that Congress enacted this law. It is in the light of this "history of the times when it was passed" that the Court must determine the "intent of Congress." *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 273; *Battfield* v. *Stranahan*, 192 U. S. 470, 494; *Ozawa* v. *United States*, 260 U. S. 178, 194; *Platt* v. *Union Pacific Railroad Co.*, 99 U. S. 48, 64.

Moreover, the nature of savings and loan associations, and the interests which have always been protected by the creating sovereign, reveal the purposes Congress sought to achieve, and the interests it desired to protect, by providing for the appointment of conservators and receivers. Building and loan associations are "quasi-public corporations, chartered to encourage thrift and promote the ownership of homes, with powers and immunities peculiarly their own." *Hopkins Federal Savings & Loan Assn.* v. *Cleary*, 296 U. S. 315, 328. They are "so organized as to attract the savings of persons of modest means. Confidence is essential to the stability and maintenance of these institutions." *People ex rel Barrett* v. *The Logan County Bldg. & Loan Assn.*, 369 Ill. 518, 525. There is a long history of governmental regulation of these associations, and it can fairly be said that the dominant purpose of such strict supervision has always been to protect the shareholders and other creditors against fraud, mismanagement, or injurious conduct, and to preserve the institutions in proper operating condition. The policy has been, as the New Jersey court summed it up, "to protect the activities and safety of building and loan associations," and "to safeguard the interests of those who deal with such associations" (*Veix* v. *Seneca Bldg. and Loan Assn.* 126 N. J. L. 314, 323); as this Court stated it: "* * * the state has a peculiar interest and a concomitant power of supervision and

regulation to prevent injury and loss to their members", and again in referring to the "public interest" which warrants regulation of these institutions, the Court defined it as "the legitimate end of conserving or equitably administering the assets in the interest of all members." *Treigle* v. *Acme Homestead Assn.*, 297 U. S. 189, 197–198. With respect to Federal savings and loan associations, there is an additional interest to be protected. The Government itself has a significant stake, through its instrumentality, the Federal Savings and Loan Insurance Corporation, which insures the accounts of Federal associations. Title IV of the National Housing Act. (Act of June 27, 1934, ch. 847, 12 U. S. C. 1724). The assets of these associations have to be protected from dissipation in order to conserve the Insurance Corporation's fund.

2. *Merger:* The lower court's strictures also condemn the power which Section 5 (d) grants the Administration to merge a Federal savings and loan association. We believe that the statute is equally immune from attack on this point, but we have confined our detailed argument to the portion of Section 5 (d) treating with appointment of a conservator or receiver, since that presents the only real constitutional issue in the case. The Bank Administration has not sought to merge Long Beach, and has indicated no intent to do so; the "threat" and "danger" of a merger which appellees claim to exist is a chimera of their own,

needlessly dragged into and through the litigation. We shall, however, outline the statutory standards controlling administrative action in this field.

There is no question but that Congress may provide for the dissolution of a corporation in the same Act in which it provides for its creation. The same guides which serve the administrative agency in the creation of such institutions may just as effectively serve it when the question of the advisability of their continuance comes before it. By Section 5 (a) Congress vested authority in the Board to create a Federal savings and loan association "in order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes", "giving primary consideration to the best practices of local mutual thrift and home-financing institutions;" subsection (e) adds, for the Board's consideration, the factors that the organizers and managers must be "persons of good character and responsibility", that "a necessity exists for such an institution in the community to be served," that "there is a reasonable probability of its usefulness and success," and that the institution can be established "without undue injury to properly conducted existing local thrift and home-financing institutions." By setting this pattern for association's existence, Congress has likewise established policies under which the Bank Administration may cause it to cease to exist, by merger, dissolution, or liquidation. As with ap-

pointment of a conservator, other sources of guidance are supplied by the "best practices" on merger of state building and loan associations, and the provisions of other federal statutes providing for merger of banking and financial institutions.

B. *The statutory standards are sufficient*

The course of this Court's decisions on delegation of legislative authority clearly supports the validity of Section 5 (d), and the sufficiency of its standards guiding administrative action.

1. We have urged that the policy governing appointment of a conservator is to be found, in large part, outside of the literal bounds of Section 5 (d); but even if scrutiny be severely confined to the express words of that provision, its validity must be sustained. As we have shown, *supra*, pp. 60–68, to those expert in the field, the term "conservator" itself imports an adequate policy controlling the Bank Administration, just as "interurban" and "bituminous," standing alone, are "wholly adequate as a standard for administrative action." *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 399; *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177, 180–183; cf. *Pittsburgh Plate Glass Co.* v. *Labor Board*, 313 U. S. 146, 165–166 (unit "appropriate" for collective bargaining). Similarly, this Court has upheld, against attack on the ground of improper delegation, Section 11 (k) of the Federal Reserve Act

which gives the Reserve Board, without prescribing any statutory standard as to when such action shall be taken, power "to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe." (Act of December 23, 1913, 38 Stat. 251, 262, 12 U. S. C. 248 (k).) *First Nat. Bank* v. *Fellows ex rel. Union Trust Co.*, 244 U. S. 416, 421, 427.

2. Anything beyond the most restricted and literal reading of Section 5 (d) reveals guides to administrative action which are certainly more specific and definite than many another standard which this Court has upheld: "public interest" (*New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24; *United States* v. *Chemical Foundation*, 272 U. S. 1; *Avent* v. *United States*, 266 U. S. 127); "public interest, convenience, or necessity" (*National Broadcasting Co.* v. *United States*, 319 U. S. 190, 225–226); "unreasonable obstruction to navigation" (*Union Bridge Co.* v. *United States*, 204 U. S. 364); "just and reasonable" for rate-making purposes (*Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 398); "undue preferences and unjust discriminations" (*Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 427); "reciprocally unequal and unreasonable" customs

duties (*Field* v. *Clark*, 143 U. S. 649); "unfair methods of competition" (*Federal Trade Commission* v. *Keppel & Bros.*, 291 U. S. 304, 312, 314); "primarily" or substantially (*Federal Reserve Board* v. *Agnew*, this Term, No. 66, decided January 6, 1947); "necessary for the national security or defense," as governing authority to take possession of and operate telegraph lines (*Dakota Central Tel. Co.* v. *South Dakota*, 250 U. S. 163). Just as the broad concept of "public interest" draws meaning from the "purpose of the Act, the requirements it imposes, and the context of the provision in question" (*New York Central Securities Corp.* v. *United States*, *supra*, at 24), as well as from the nature of the business regulated (*Federal Radio Comm.* v. *Nelson Bros. Co.*, 289 U. S. 266, 285; *Nat. Broadcasting Co.* v. *United States*, 319 U. S. 190, 225–226), so the connotations of the concept of a "conservator," the purposes of Section 5 and its other requirements, and the nature of mutual loan associations, all present the administrator with "ascertainable criteria" for appointment of a conservator.

3. The preferred construction of the present statute, as we have argued (*supra*, pp. 60–79), furnishes to the administrator not a single general guide (such as is provided by the statutes upheld in the foregoing cases), but a comprehensive listing of factors to be considered in regulating the appointment of a conservator. This Court has repeatedly upheld against the

charge of improper delegation, statutes specifying multiple factors to be weighed by administrators in taking designated action. *Hampton & Co.* v. *United States,* 276 U. S. 394; *Mulford* v. *Smith,* 307 U. S. 38, 48–49; *Currin* v. *Wallace,* 306 U. S. 1; *United States* v. *Rock Royal Cooperative,* 307 U. S. 533, 574–577; *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 399; *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126; *Yakus* v. *United States,* 321 U. S. 414; *Bowles* v. *Willingham,* 321 U. S. 503; *American Power & Light Co.* v. *Securities and Exchange Commission,* Nos. 4 and 5, this Term, decided November 25, 1946. The administrator may also be authorized to consider unnamed "relevant factors," and may himself determine the respective weights attributable to each factor (*Hampton & Co.* v. *United States, supra; Opp Cotton Mills* v. *Administrator, supra; Yakus* v. *United States, supra*).

4. The three cases in which this Court has invalidated an act of Congress because of an unlawful delegation of legislative authority and on which the lower court relies (R. 377, 378) (*Schechter Corp.* v. *United States,* 295 U. S. 495; *Panama Refining Co.* v. *Ryan,* 293 U. S. 388; *Carter* v. *Carter Coal Co.,* 298 U. S. 238) are plainly distinguishable. Section 3 of the National Industrial Recovery Act, held invalid in the *Schechter* case, authorized the establishment of codes of

"fair" competition, "the nature of whose permissible provisions was left undefined" (see *Yakus* v. *United States, supra,* at 424), and this conferred virtually "unfettered discretion" in enacting laws for the government of trade and industry throughout the country (*Schechter* case, *supra,* at 537). Here, the administrative authority is limited to Federal savings and loans associations, and extends only to the precise subjects designated in Section 5 (d). Section 9 (c) of the National Industrial Recovery Act, contested in *Panama Refining Co.* v. *Ryan, supra,* defined the subject matter to which the President's authority extended (i. e., the prohibition of the transportation of petroleum); but, as the Court saw it, did not specify in any way, expressly or by implication, the occasion for the exercise of this authority. In the Court's view, the President had unlimited power to "lay down the prohibition, or not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment" (*id.* at 415). Here, as we have shown, the Bank Administration's authority is "canalized within banks that keep it from overflowing" (Cardozo, J., concurring in *Schechter Corp.* v. *United States, supra,* at 551), both by the narrow meaning of "conservator" and by its context in this and similar statutes. In *Carter* v. *Carter Coal Co.,* 298 U. S. 238, the Court condemned the provision

of the Bituminous Coal Conservation Act of 1935 authorizing the majority of coal producers and miners to fix wages on the ground that it constituted a delegation of legislative authority "to private persons" (*id.* at 311). Section 5 (d), on the other hand, vests all authority in public officials.

5. Federal savings and loan associations are Federal instrumentalities, quasi-public institutions created by the United States to fulfill a public purpose. *Waterbury Savings Bank* v. *Danaher*, 128 Conn. 78, 95–100; cf. *Knox Nat. Farm Loan Assn.* v. *Phillips*, 300 U. S. 194 (Federal farm loan associations); *Hopkins Federal Savings & Loan Assn.* v. *Cleary*, 296 U. S. 315, 328 (State building and loan associations).[*] It may well be that Congressional legislation regulating such public instrumentalities can validly allow broader discretion to the supervisory agency than would be proper for statutes governing private businesses. Of building and loan associations this Court has said: "We recognize that these associations, like banks and public service companies, are subject to a degree of regulation which would be unnecessary and unreasonable in the case of a purely private corporation." *Treigle* v. *Acme*

[*] The constitutional authority of Congress to create Federal savings and loan associations was upheld in *First Federal Savings and Loan Association of Wisconsin* v. *Loomis*, 97 F. 2d 831 (C. C. A. 7), certiorari granted, 305 U. S. 564, and dismissed on motion of petitioners, 305 U. S. 666, and is not raised by appellees (R. 633, 643).

Homestead Assn., 297 U. S. 189, 197. Accordingly, the cases involving contested Government regulation of the conduct of private business are not applicable here (cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113), and less strict standards for controlling administrative action ought to be required. Cf. *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304.

C. *An administrative hearing may properly be provided by regulation*

The District Court also held Section 5 (d) invalid because it does not, in terms, provide for notice and hearing (R. 377). But Section 5 (d) itself expressly authorizes the Bank Administration to adopt rules and regulations governing appointment of a conservator. Pursuant to this authority the Administration promulgated a regulation providing for an administrative hearing, and no one has asserted that such a regulation was not a lawful exercise of the Administration's statutory authority. Since the regulation was authorized by the statute, it has the effect of a law.

The regulation is Section 206.2 (quoted *infra*, pp. 114–115), which fully establishes procedure for an administrative hearing at the request of the board of directors of an association, within fourteen days after the appointment of a conservator or receiver. Such a hearing was formally requested here by the Association's board

(R. 92), and the Bank Administration was entirely willing to grant it,[39] but was prevented by the judicial intervention of the lower court, acting on appellees' motion (R. 244).

There is plain error in a holding that the statute must itself provide for notice and hearing. The statutes authorizing the Comptroller of the Currency to appoint receivers and conservators of national banks do not so provide. Act of June 30, 1876, 19 Stat. 63 (12 U. S. C. 191); R. S. 5234, as amended, 12 U. S. C. 192; Bank Conservation Act, Sec. 203, 48 Stat. 2, 12 U. S. C. 203. If a hearing is constitutionally necessary (but cf. *Bushnell* v. *Leland*, 164 U. S. 684; *State Savings & Commercial Bank* v. *Anderson*, 238 U. S. 611, affirming 165 Cal. 437), its provision by regulation is sufficient to satisfy all of appellees' rights. Section 5 (d) clearly authorizes the Bank Administration to provide in its rules and regulations for a hearing, and such a hearing was offered to the Association, and to any other interested person, partnership, association, or corporation (R. 95). Appellees were thus tendered "everything which the Constitution could possibly guarantee them in this respect," and they are not adversely affected by any omission in the statute to direct a hearing. *American Power & Light Company* v. *Securities and Exchange Commission*, Nos. 4 and 5, this

[39] The hearing was actually set for July 3, 1946, at Los Angeles, California (R. 95).

Term, decided November 25, 1946, slip opinion, pp. 12–14.[40]

That the right to a hearing accrued only after the appointment of the Conservator does not deprive appellees of due process. *Yakus* v. *United States*, 321 U. S. 414, 436, 442; *Bowles* v. *Willingham*, 321 U. S. 503, 519–520; *Utley* v. *St. Petersburg*, 292 U. S. 106, 109–110; *Phillips* v. *Commissioner*, 283 U. S. 589, 596–597. A favorable administrative determination leads to immediate return of the old management to control of the Association; temporary management of an association by a conservator is hardly likely to inflict irreparable harm on an association, or its owners. As with wartime price control, there are special reasons for prompt and immediate appointment of a conservator without prior hearing. The delicate balance of a financial institution, its reputation and its community usefulness, can be immeasurably harmed by a hearing at which a Government agency is forced to claim improper or unsafe action by the institution's management which remains in control during the hearing. Moreover, the speedy intervention of a conservator may be necessary to prevent continued improper or unsound practices by the management

[40] The Government does not question the right of the Association to secure appropriate judicial review, after completion of the administrative hearing, of the order appointing a conservator. Cf. *Stark* v. *Wickard*, 321 U. S. 288; *Federal Reserve Board* v. *Agnew*, No. 66, this Term, decided January 6, 1947; Administrative Procedure Act, Public Law No. 404, 79th Cong., 2d Sess., c. 324, approved June 11, 1946, Section 10.

from irreparably damaging the institution and its shareholders. It is for these reasons that some twenty-five States have provided for the appointment of a receiver, conservator, or similar official, without prior hearing or litigation. (See Appendix C, *infra*, for specimen statutes.)

III

THE DISTRICT COURT ERRED IN ENTERING A FINAL JUDGMENT

Little discussion is necessary to show that the District Court erred in entering a final judgment. A mere statement of the steps taken in the case will indicate the impropriety of issuing a sweeping permanent decree of the type entered by the three-judge court. See *supra*, pp. 14–15. A complaint was filed praying for ouster of the conservator, for permanent injunctions and for other relief (R. 1–17). The original plaintiffs, joined by certain of the other appellees, then filed motions for *preliminary* injunctions restraining appellants from (a) merging Long Beach (R. 21, 67), and (b) holding an administrative hearing on the conservator's appointment (R. 98). Appellee Long Beach, with the concurrence of the original plaintiffs (R. 69), then moved "that plaintiffs' motion for a preliminary injunction restraining and enjoining the defendants from various acts be heard by the Honorable Court upon oral testimony in Court of witnesses to be produced and subpoenaed

to attend said hearing" (R. 77). A motion to dismiss the original complaint was filed by defendant-appellant Ammann (R. 82); a motion to dismiss or to quash return of service, on the ground that he could not be sued within the district and had not been properly served, was filed by defendant-appellant Fahey (R. 260). The case was set for hearing by a three-judge court on all these motions (R. 232) and argued by counsel (R. 607, 625, 650, 704); no oral testimony was taken nor documentary or written evidence introduced on any phase of the case at that time. The three-judge court held, in a written opinion (filed September 5, 1946) that Section 5 (d) of the Home Owners Loan Act of 1933, as amended, was "unconstitutional and void as attempting to delegate legislative power to the Federal Home Loan Bank Board created under the Federal Home Loan Bank Act," and it directed that "judgment be entered in accordance with this opinion" (R. 378).

Without further hearing or trial, and without any further pleadings, the three-judge court thereafter entered, over appellants' protest (R. 424–433), a sweeping final judgment denying the appellants' motions, and granting all of the permanent relief prayed for in the complaint (R. 496).[41] The defendant-appellants had not elected to stand on

[41] The court denied the appellees' motion to take oral testimony and evidence at the hearing on the motion for preliminary injunctions (R. 492).

their motions; nor were they in default in answering the complaint."[42] No answer had been filed; and no motion for judgment on the pleadings or for summary judgment had been made. Appellees had not at any time moved to oust the conservator, and their only pending motions were for *preliminary* injunctions against merger and to restrain the holding of an administrative hearing. Nevertheless, the court's decree (a) ordered Ammann's removal, (b) *permanently* restrained appellants from merging the Association, (c) *permanently* enjoined appellants from holding an administrative hearing, (d) restored the original officers to control of the Association; (e) ordered appellants to account for all transactions occurring during their control of the Association, (f) *permanently* enjoined appellants "from ever asserting any claims, right, title, or interest in or to said property, or any of it," and (g) ordered appellants "to do and perform such acts as are necessary or expedient to carry out the provisions" of the decree. The last paragraph of the decree "reserve[s] to the District Court the right to make such other and further orders herein as shall hereafter be necessary to determine collateral

[42] On September 9, 1946, the lower court entered an order extending the time for all parties to plead to a date "20 days after the entry of the Order or Judgment upon the Opinion of the court heretofore filed" (R. 379).

issues hereto and to give to this Decree full force and effect" (R. 499–500).

This decree is undoubtedly a final one, granting to appellees all the relief for which they prayed in their complaints. By the court's precipitate action, "the whole purpose of the suit has been accomplished * * * and nothing now remains to be done but to carry what has been decreed into execution." *Winthrop Iron Co.* v. *Meeker,* 109 U. S. 180, 183. "And when the decree decides the right to the property in contest, and directs it to be delivered by the defendant to the complainant * * * and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent * * *." *Forgay* v. *Conrad,* 6 How. 204, quoted with approval in *Winthrop Iron Co.* v. *Meeker; supra,* at 183. Cf. *Gulf Refining Co.* v. *United States,* 269 U. S. 125, 136; *Knox National Farm Loan Assn.* v. *Phillips,* 300 U. S. 194, 197–198. The last paragraph of the decree, quoted above, demonstrates the finality with which the District Court itself viewed the judgment.

The District Court was obviously without authority to enter such a final decree on behalf of the plaintiffs, before answer and merely upon the denial of defendants' motion to dismiss. *Re Sanford Fork & Tool Co.,* 160 U. S. 247, 257–258; *Wm. J. Friday & Co.* v. *United States,* 61 F. 2d 370,

373 (C. C. A. 3). The *Sanford Fork* case involved a court's entering of a final decree after overruling of exceptions to an answer, under the old equity practice. The principle there announced by this Court is precisely applicable, *mutatis mutandis*, to the instant denial of defendants' motions to dismiss (pp. 257–258):

> But when the matter set down for hearing is the plaintiff's exceptions to the answer, the case is not ripe for final decree; the only question to be decided is the sufficiency of the answer; and no final decree can be entered against either party, unless it declines or omits to plead further.
>
> The Circuit Court, upon sustaining the exceptions, could not (unless the defendants chose to stand by their answer) enter a final decree against the defendants; or do anything more than order them to put in a full and complete answer, on pain of being held to have confessed the bill. If the Circuit Court, instead of sustaining the exceptions to the answer, had overruled those exceptions, the plaintiffs would have had the right to file a replication, and the bill could not be dismissed unless and until they neglected to file one.

The result of the District Court's action is that, contrary to all canons of orderly judicial procedure, a final decree had been entered simul-

taneously with the denial of a motion to dismiss, when time to plead had not expired, when there was no default, without giving the defendants an opportunity to answer, without an election by defendants to stand on their motions, without a trial on the facts, and without any motion by plaintiffs for judgment.

IV

THE INTERPLEADERS AND CROSS-CLAIMS OF APPELLEES TITLE SERVICE COMPANY AND WALLIS, AND THE THIRD PARTY COMPLAINT AGAINST THE FEDERAL HOME LOAN BANKS, WERE ERRONEOUSLY ALLOWED

A. The interpleaders and cross-claims of appellees Title Service Company and Wallis should not have been allowed to be interposed, since neither is maintainable under the Federal interpleader provisions or general equity practice.

1. The Title Service Company, which is controlled by substantially the same persons who constituted Long Beach's old management (R. cf. R. 522), deposited 174 notes and deeds of trust in the registry of the court (*supra*, pp. 9–10), and prayed that appellants and the appellee Association be required to litigate their conflicting claims to said deeds of trust. On the basis of this purported interpleader, the Company then proceeded to make virtually the same allegations of unlawful action against appellants as the original plaintiff and the Association have done

(R. 30–39), and throughout the litigation Title Service Company has vehemently supported, if it did not initiate, every action and position taken against or in opposition to appellants Fahey and Ammann. Its position in the action, now and at all times, has been indistinguishable from that of the original plaintiffs and of the Association, and Title Service may fairly be called those major parties' faithful shadow.[43]

In reality, there is no dispute as to the property deposited with the court. All agree that the Association is the beneficiary in all the trust deeds, that the right to reconveyance upon payment in full rests with the trustors, that the Association has full right to the money represented by the notes. The only basis claimed for interpleader is that Title Service Company was in doubt whether it should reconvey the property at the request of the Conservator, the legality of whose status was not clear. This asserted difficulty was easily obviated, in the court below, by duplicate instructions to Title Service Company from the Conservator and the former management (R. 320).[44] This slim basis cannot be used,

[43] Formerly, interpleading parties were required to file affidavits that they were not acting in collusion with the other parties. See 2 Moore and Friedman, Moore's Federal Practice, p. 2196.

[44] Home Investment Company paid over some $800,000 into the court's registry, and secured the reconveyances (R. 319–326).

either under the Interpleader Act of 1936 (Judicial Code, Section 24 (26), 28 U. S. C. 41 (26)) or Rule 22 (1) of the Federal Rules of Civil Procedure, to launch a broadside attack against the constitutionality of Section 5 (d) of the Home Owners' Loan Act, with which Title Service Company is in no way concerned and which it has no standing to contest.[15] Except in so far as its interpleader sought disposition of the 174 deeds, notes, and requests for reconveyances—and, with consent of all parties, that has already occurred—the Company's cross-claim was entirely improper and should have been dismissed. It's sole purpose was to attempt to prosecute a claim which was of no concern to the Company, and to try to use the interpleader device to secure jurisdiction over appellant Fahey.

2. Similarly, Wallis' interpleader, based on his deposit of a $50,000 check, should not have been allowed. Wallis, too, appears as an *alter ego* of the shareholder plaintiffs and the Association, and concurs wholly in their attacks upon Section

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[15] As Conservator, Ammann is undoubtedly a public officer appointed under at least apparent authority granted by Congress, and is therefore a *de facto* officer whose acts are binding on third parties, such as Title Service Company, regardless of the statute's constitutionality. *Cocke* v. *Halsey*, 16 Pet. 71, 87; *Waite* v. *Santa Cruz*, 184 U. S. 302; *United States ex rel Doss* v. *Lindsley*, 148 F. 2d 22 (C. C. A. 7), certiorari denied, 325 U. S. 835.

5 (d), and the appellants' authority (R. 54–63). As an attorney for the Association, in which capacity he received the check to further its litigation against the Bank Administration, he has no standing to attack Section 5 (d) and no litigable interest in the Conservator's appointment. The only possible controversy as to the proceeds of the check is between Wallis and the Conservator, since the Association's old management does not contest Wallis' right to the proceeds (R. 192–195); accordingly, the multiple claims on which interpleader must rest do not exist here. See Rule 22 (1); Judicial Code, Section 24 (26). Furthermore, since Wallis claims the proceeds of the check as his own (R. 60–61), he does not exhibit the disinterestedness normally required of the interpleading party. *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 72; *Sanders* v. *Fertilizer Works*, 292 U. S. 190, 200; *Groves* v. *Sentell*, 153 U. S. 465, 485; *Killian* v. *Ebbinghaus*, 110 U. S. 568, 571.[46] He, too, is using interpleader as a device to add his attack on Section 5 (d).

3. Attempt was made to secure jurisdiction over appellant Fahey by service in the District of Columbia under Judicial Code, Section 24 (26), 28

[46] Moreover, Wallis and Long Beach are both citizens of California, and it is doubtful whether Judicial Code, Section 24 (26) applies where such adverse claimants are citizens of the same state.

U. S. C. 41 (26), but since, as we have shown, neither interpleader was warranted by that statute, it did not validate service outside of California. Cf. *Robertson* v. *Railway Labor Board*, 268 U. S. 619; *Employers Reinsurance Corp.* v. *Bryant*, 299 U. S. 374, 377.

B. The third-party complaint of the Association against the Federal Home Loan Banks of Los Angeles, Portland, and San Francisco (R. 222) was purportedly filed under Rule 14 (a) of the Federal Rules, which provides for a defendant's serving such third-party pleading "upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him." But it requires only a glance at the pleadings to show that the cause of action attempted to be stated in the third-party complaint is utterly foreign to the subject matter of the complaint in the main action; that it seeks relief in no way involved in the relief sought in the main action; that in the main action no real relief is sought against Long Beach; that there is not and cannot be liability to Long Beach or to the shareholder plaintiffs for all or any part of the shareholders' claim against the Association. The complaint in the main action sought primarily the removal of the Conservator appointed for the Association, and no relief was sought against the Association itself. The third-

party complaint filed by the Association asked primarily for a declaratory judgment as to the status of the former Federal Home Loan Bank of Los Angeles, of the former Federal Home Loan Bank of Portland and of the Federal Home Loan Bank of San Francisco, the first two of which had been merged into the last under the authority of the Federal Home Loan Bank Act.[47] There is no connection between that merger and the appointment of the Conservator for Long Beach (R. 290–295), and no part of the plaintiffs' claim against Long Beach concerns or involves the Federal Home Loan Bank merger. The third-party complaint should not have been permitted.

CONCLUSION

We believe that, for the foregoing reasons, the District Court erred in granting judgment against the Government. However, the number and interrelationship of the issues presented to this Court makes the disposition of the case, if appellants should succeed, a matter of some complexity. In aid of the Court's deliberations, we suggest the following as the proper disposition of the case should appellants prevail on any or all of the issues: (1) The District Court should be re-

[47] There appears to have been some confusion in the court below as to the statutes involved, and some failure to recognize that the Home Owners' Loan Act is not the Federal Home Loan Bank Act. The opinion of the lower court referred first to one and then to the other as if they were the

versed, and the entire action ordered dismissed because of failure to exhaust administrative remedies; (2) if the doctrine of exhaustion is held inapplicable where a constitutional issue is raised, all appellees should be held estopped or without standing to contest the constitutionality of Section 5 (d), and the exhaustion doctrine, as well as the defense of indispensability of defendant Fahey, applied to dismiss the remaining phase of the case, i. e., the arbitrariness of the Conservator's appointment as a matter of administrative action; (3) if the doctrine of exhaustion is held inapplicable only to constitutional issues, but the Act held constitutional, the entire action should be ordered dismissed on the ground that appellees have failed to exhaust administrative remedies on the only other issue raised by the complaint; (4) if the exhaustion, estoppel, and indispensability-of-parties doctrines are all held inapplicable, Section 5 (d) should be held constitutional and the District Court's entry of final decree erroneous, and the District Court's judgment reversed and the cause remanded to the District Court for such further proceedings on the administrative phase as may be proper; (5) if the other defenses are inapplicable and if Section 5 (d) should be held unconstitutional, as a matter of orderly procedure the cause should be remanded for proper opportunity for defense before entry of a final decree,

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same (R. 374, 376, 378). It condemns one because of action taken under the other (R. 377).

the cross-claims and third-party complaints ordered dismissed on procedural grounds, and personal relief against appellant Fahey set aside.

Respectfully submitted.

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APRIL 1947.

APPENDIX A

1. The provisions of Section 5 of the Home Owners' Loan Act of 1933, as amended, 48 Stat. 128, 132, 12 U. S. C. 1461, 1464 (Act of June 13, 1933, 48 Stat. 132, as amended by the Act of April 27, 1934, 48 Stat. 645; the Act of May 28, 1935, 49 Stat. 297, and the Act of Aug. 10, 1939, 53 Stat. 1402), are as follows:

> SEC. 5. (a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations", and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.
>
> (b) Such associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is therein provided. No deposits shall be accepted and no certificates of indebtedness shall be issued except for such borrowed money as may be authorized by regulations of the Board.
>
> (c) Such associations shall lend their funds only on the security of their shares or on the security of first liens upon homes or combination of homes and business property within fifty miles of their home office:

Provided, That not more than $20,000 shall be loaned on the security of a first lien upon any one such property; except that not exceeding 15 per centum of the assets of such association may be loaned on other improved real estate without regard to said $20,000 limitation, and without regard to said fifty-mile limit, but secured by first lien thereon: *And provided further,* That any portion of the assets of such associations may be invested in obligations of the United States or the stock or bonds of a Federal Home Loan Bank: *And provided further,* That any such association which is converted from a State-chartered institution may continue to make loans in the territory in which it made loans while operating under State charter.

(d) The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation.

(e) No charter shall be granted except to persons of good character and responsibility, nor unless in the judgment of the Board a necessity exists for such an institution in the community to be served, nor unless there is a reasonable probability of its usefulness and success, nor unless the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions.

(f) Each such association, upon its incorporation, shall become automatically a

member of the Federal Home Loan Bank of the district in which it is located, or if convenience shall require and the Board approve, shall become a member of a Federal Home Loan Bank of an adjoining district. Such associations shall qualify for such membership in the manner provided in the Federal Home Loan Bank Act with respect to other members.

(g) The Secretary of the Treasury is authorized on behalf of the United States to subscribe for preferred shares in such associations—which shall be preferred as to the assets of the association and which shall be entitled to a dividend, if earned, after payment of expenses and provision for reasonable reserves, to the same extent as other shareholders. It shall be the duty of the Secretary of the Treasury to subscribe for such preferred shares upon the request of the Board; but the subscription by him to the shares of any one association shall not exceed $100,000, and no such subscription shall be called for unless in the judgment of the Board the funds are necessary for the encouragement of local home financing in the community to be served and for the reasonable financing of homes in such community. Payment on such shares may be called from time to time by the association, subject to the approval of the Board and the Secretary of the Treasury; but the amount paid in by the Secretary of the Treasury shall at no time exceed the amount paid in by all other shareholders, and the aggregate amount of shares held by the Secretary of the Treasury shall not exceed at any time the aggregate amount of shares held by all other shareholders. To enable the Secretary of the Treasury to make such subscriptions when

called there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000, to be immediately available and to remain available until expended. Each such association shall issue receipts for such payments by the Secretary of the Treasury in such form as may be approved by the Board, and such receipts shall be evidence of the interest of the United States in such preferred shares to the extent of the amount so paid. Each such association shall make provision for the retirement of its preferred shares held by the Secretary of the Treasury, and beginning at the expiration of five years from the time of the investment in such shares, the association shall set aside one third of the receipts from its investing and borrowing shareholders to be used for the purpose of such retirement. In case of the liquidation of any such association the shares held by the Secretary of the Treasury shall be retired at par before any payments are made to other shareholders.

(h) Such associations, including their franchises, capital, reserves, and surplus, and their loans and income, shall be exempt from all taxation now or hereafter imposed by the United States (except the taxes imposed by sections 1410 and 1600 of the Internal Revenue Code with respect to wages paid after December 31, 1939, for employment after such date), and all shares of such associations shall be exempt both as to their value and the income therefrom all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States; and no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such

associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions.

(i) Any member of a Federal Home Loan Bank may convert itself into a Federal savings and loan association under this Act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this Act.

(j) In addition to the authority to subscribe for preferred shares in Federal savings and loan associations, the Secretary of the Treasury is authorized on behalf of the United States to subscribe for any amount of full paid income shares in such associations, and it shall be the duty of the Secretary of the Treasury to subscribe for such full paid income shares upon the request of the Federal Home Loan Bank Board. Payment on such shares may be called from time to time by the association, subject to the approval of said Board and the Secretary of the Treasury, and such payments shall be made from the funds appropriated pursuant to subsection (g) of this section; but the amount paid in by the Secretary of the Treasury for shares under this subsection and such subsection (g), together shall at no time exceed 75 per centum of the total investment in the shares of such association by the

Secretary of the Treasury and other shareholders. Each such association shall issue receipts for such payments by the Secretary of the Treasury in such form as may be approved by said Board and such receipts shall be evidence of the interest of the United States in such full paid income shares to the extent of the amount so paid. No request for the repurchase of the full paid income shares purchased by the Secretary of the Treasury shall be made for a period of five years from the date of such purchase, and thereafter requests by the Secretary of the Treasury for the repurchase of such shares by such associations shall be made at the discretion of the Board; but no such association shall be requested to repurchase any such shares in any one year in an amount in excess of 10 per centum of the total amount invested in such shares by the Secretary of the Treasury. Such repurchases shall be made in accordance with the rules and regulations prescribed by the Board for such associations.

(k) When designated for that purpose by the Secretary of the Treasury, any Federal savings and loan association or member of any Federal Home Loan Bank may be employed as fiscal agent of the Government under such regulations as may be prescribed by said Secretary and shall perform all such reasonable duties as fiscal agent of the Government as may be required of it. Any Federal savings and loan association or member of any Federal Home Loan Bank may act as agent for any other instrumentality of the United States when designated for that purpose by such instrumentality of the United States.

SEC. 6. To enable the Board to encourage local thrift and local home financing and to promote, organize, and develop the associations herein provided for or similar associations organized under local laws, there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $150,000, to be immediately available and remain available until expended, subject to the call of the Board, which sum, or so much thereof as may be necessary, the Board is authorized to use in its discretion for the accomplishment of the purposes of this section without regard to the provisions of any other law governing the expenditure of public funds. For the purposes of this section the Secretary of the Treasury is authorized and directed to allocate and make immediately available to the Board, out of the funds appropriated pursuant to section 5 (g), the sum of $700,000. Such sum shall be in addition to the funds appropriated pursuant to this section, and shall be subject to the call of the Board and shall remain available until expended. The sums appropriated and made available pursuant to this section shall be used impartially in the promotion and development of local thrift and home-financing institutions, whether State or Federally chartered.

SEC. 7. The provisions of this Act shall apply to the continental United States, to the Territories of Alaska and Hawaii, and to Puerto Rico and the Virgin Islands.

2. The Federal Home Loan Bank Act, 47 Stat. 725, 12 U. S. C. 1424, provides in pertinent part as follows:

SEC. 4. (a) * * * No institution shall be eligible to become a member of, or a nonmember borrower of, a Federal Home Loan Bank if, in the judgment of the board, its financial condition is such that advances may not safely be made to such institution or the character of its management or its home-financing policy is inconsistent with sound and economical home financing, or with the purposes of this Act.

SEC. 5. No institution shall be admitted to or retained in membership, or granted the privileges of nonmember borrowers, if the combined total of the amounts paid to it for interest, commission, bonus, discount, premium, and other similar charges, less a proper deduction for all dividends, refunds, and cash credits of all kinds, creates an actual net cost to the home owner in excess of the maximum legal rate of interest or, in case there is a lawful contract rate of interest applicable to such transactions, in excess of such rate (regardless of any exemption from usury laws), or, in case there is no legal rate of interest or lawful contract rate of interest applicable to such transactions, in excess of 8 per centum per annum in the State where such property is located. This section applies only to home mortgage loans made after the enactment of this Act.

3. The National Housing Act, 48 Stat. 1246, 12 U. S. C. 1724, as amended, provides in pertinent part as follows:

SEC. 403. (a) It shall be the duty of the Corporation to insure the accounts of all Federal savings and loan associations, and it may insure the accounts of building and loan, savings and loan, and homestead associations and cooperative banks organized

and operated according to the laws of the State, District, or Territory in which they are chartered or organized.

(b) Application for such insurance shall be made immediately by each Federal savings and loan association, and may be made at any time by other eligible institutions.

* * *

(c) The Corporation shall reject the application of any applicant if it finds that the capital of the applicant is impaired or that its financial policies or management are unsafe; and the Corporation may reject the application of any applicant if it finds that the character of the management of the applicant or its home financing policy is inconsistent with economical home financing or with the purposes of this title. Upon the approval of any application for insurance the Corporation shall notify the applicant, and upon the payment of the initial premium charge for such insurance, as provided in section 404, the Corporation shall issue to the applicant a certificate stating that it has become an insured institution. In considering applications for such insurance the Corporation shall give full consideration to all factors in connection with the financial condition of applicants and insured institutions, and shall have power to make such adjustments in their financial statements as the Corporation finds to be necessary.

4. The Rules and Regulations for the Federal Savings and Loan System provide in part as follows:

PART 206. APPOINTMENT OF CONSERVATOR OR RECEIVER

206.1 RECEIVER OR CONSERVATOR. APPOINTMENT. Whenever, in

the opinion of the Federal Home Loan Bank Administration, any Federal savings and loan association:

(1) is conducting its business in an unlawful, unauthorized, or unsafe manner;

(2) is in an unsound or unsafe condition, or has a management which is unsafe or unfit to manage a Federal savings and loan association;

(3) cannot with safety continue in business;

(4) is impaired in that its assets do not have an aggregate value (in the judgment of the Federal Home Loan Bank Administration) at least equal to the aggregate amount of its liabilities to its creditors, members, and all other persons;

(5) is in imminent danger of becoming impaired;

(6) is pursuing a course that is jeopardizing or injurious to the interests of its members, creditors, or the public;

(7) has suspended payment of its obligations;

(8) has refused to submit its books, papers, records, or affairs for inspection to any examiner or lawful agent appointed by the Federal Home Loan Bank Administration;

(9) has refused by the refusal of any of its officers, directors, or employees to be examined upon oath by the Federal Home Loan Bank Administration or its representative concerning its affairs; or

(10) has refused or failed to observe a lawful order of the Federal Home Loan Bank administration,

the Federal Home Loan Bank Administration may appoint the Federal Savings and Loan Insurance Corporation receiver for such Federal association which appoint-

ment shall be for the purpose of liquidation, or the Federal Home Loan Bank Administration may appoint a conservator for such Federal association to conserve the assets of the association pending further disposition of its affairs. The appointment shall be by order, which order shall state on which of the above causes the appointment is based. Any conservator so appointed shall furnish bond for himself and his employees, in form and amount and with surety acceptable to the Governor of the Federal Home Loan Bank System, or any deputy or Assistant Governor, but no bond shall be required of the Federal Savings and Loan Insurance Corporation as receiver. The conservator or receiver shall forthwith upon appointment take possession of the association and, at the time such conservator or receiver shall demand possession, such conservator or receiver shall notify the officer or employee of the association, if any, who shall be in the home office of the association and appear to be in charge of such office, of the action of the Federal Home Loan Bank Administration. The Secretary of the Federal Home Loan Bank Administration shall, forthwith upon adoption thereof, mail a certified copy of the order of appointment to the address of the association as it shall appear on the records of the Federal Home Loan Bank Administration and to each director of the association, known by the Secretary to be such, at the last address of each as the same shall appear on the records of the Federal Home Loan Bank Administration. If such certified copy of the order appointing the

206.2 HEARING ON APPOINTMENT. Within fourteen days (Sundays and holidays included) after the appointment of a conservator or receiver for a Federal association not at the time of such appointment in the hands of a conservator, such Federal association, which has not, by its board of directors, consented to or requested the appointment of a conservator or receiver, may file an answer and serve a written demand for a hearing, authorized by its board of directors, which demand shall state the address to which notice of hearing shall be sent. Upon receipt of such answer and written demand for a hearing the Federal Home Loan Bank Administration shall issue and serve a notice of hearing upon the institution by mailing a copy of the order of hearing to the address stated in the demand therefor and shall conduct a hearing, at which time and place the Federal association may appear and show cause why the conservator or receiver should not have been appointed and why an order should be entered by the Federal Home Loan Bank Administration discharging the conservator or receiver. Such hearing shall be held either in the district of the Federal Home Loan Bank of which such Federal association is a member or in Washington, D. C., as the Federal Home Loan Bank Administration shall determine, unless the association otherwise consents in writing. Such hearing may be held before the Federal Home Loan Bank Commissioner or before a trial examiner or hearing officer, as the Federal Home Loan Bank Administration shall determine. Such Federal association,

which has not, by its board of directors, consented to or requested the appointment of a conservator or receiver, may, within seven days (Sundays and holidays included) of such appointment, serve a written or telegraphic demand, authorized by its board of directors, upon the Federal Home Loan Bank Administration for a more definite statement of the cause or causes for the action. The time of service upon the Federal Home Loan Bank Administration for the purposes of this Section shall be the time of receipt by the Secretary of the Federal Home Loan Bank Administration.

206.3 COSTS OF HEARINGS. Costs, as determined by the Federal Home Loan Bank Administration, of hearings held pursuant to section 206.2 may be assessed against the association demanding the same upon the order of the Federal Home Loan Bank Administration unless the Federal Home Loan Bank Administration finds upon such hearing that there is no cause for the appointment of a conservator or receiver.

206.4 DISCHARGE OF CONSERVATOR OR RECEIVER. An order of the Federal Home Loan Bank Administration discharging a conservator and returning the association to its management shall restore to such Federal association all its rights, powers and privileges and shall restore the rights, powers and privileges of its officers and directors, all as of the time specified in such order, except as such order may otherwise provide. An order of the Federal Home Loan Bank Administration discharging a receiver and returning the association to its management shall by operation of law and without any conveyance or other instrument, act or deed, restore to such Federal

association all its rights, powers and privileges, revest in such Federal association the title to all its property, and restore the rights, powers and privileges of its officers and directors, all as of the time specified in such order, except as such order may otherwise provide.

APPENDIX B

Executive Order No. 9070, February 24, 1942; 7 F. R. 1529, 1 CFR, Cum. Supp., p. 1095 provides in part as follows:

CONSOLIDATING THE HOUSING AGENCIES AND FUNCTIONS OF THE GOVERNMENT INTO THE NATIONAL HOUSING AGENCY

By virtue of the authority vested in me by Title I of the First War Powers Act, 1941, approved December 18, 1941 (Public Law 354, 77th Congress), and as President of the United States, it is hereby ordered as follows:

1. The following agencies, functions, duties, and powers are consolidated into a National Housing Agency and shall be administered as hereinafter provided under the direction and supervision of a National Housing Administrator:

* * * * * *

(b) All functions, powers, and duties of the Federal Home Loan Bank Board and of its members.

* * * * * *

(d) The Federal Savings and Loan Insurance Corporation and the functions, powers, and duties of its Board of Trustees.

* * * * * *

2. The National Housing Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive a salary of $12,000 a year unless the Congress shall otherwise provide. Pending such appointment, an existing officer of the Government desig-

nated by the President shall act as National Housing Administrator.

3. There shall be three main constitutent units in the National Housing Agency. Each such unit shall be administered by a commissioner acting under the direction and supervision of the National Housing Administrator. * * * The unit administering the functions, powers, and duties of the Federal Home Loan Bank Board and its members shall be known as the Federal Home Loan Bank Administration, and the Chairman of the Federal Home Loan Bank Board shall serve as Federal Home Loan Bank Commissioner. * * * The agencies, functions, powers, and duties enumerated in sub-paragraphs (c), (d), and (k) of paragraph 1 shall be administered in the Federal Home Loan Bank Administration, * * *

* * * * *

13. Nothing herein shall impair or affect any outstanding obligations or contracts of any agency consolidated hereunder or of the United States of America (including its pledge of faith to the payment of all annual contributions now or hereafter contracted for pursuant to the United States Housing Act, as amended), or of any Insurance Funds created under the National Housing Act.

14. All orders, rules, regulations, permits, or other privileges made, issued or granted by or in respect of any agency, function, power, or duty consolidated hereunder shall continue in effect to the same extent as if such consolidation had not occurred until modified, superseded, or repealed, except that the regulations of January 11, 1941, relating to defense housing

coordination shall hereby be revoked upon the appointment or designation of the National Housing Administrator.

* * * * * *

17. This order shall become effective as of the date hereof and shall be in force and effect so long as Title I of the First War Powers Act, 1941, remains in force.

APPENDIX C

1. New York. *Banking Law, Section 606* (*McKinney's Consolidated Laws of New York Annotated,* Book 4, Section 606) provides in part as follows:

> 1. The superintendent may, in his discretion, forthwith take possession of the business and property of any banking organization whenever it shall appear that such banking organization;
>
> (a) Has violated any law;
>
> (b) Is conducting its business in an unauthorized or unsafe manner;
>
> (c) Is in an unsound or unsafe condition to transact its business;
>
> (d) Cannot with safety and expediency continue business;
>
> (e) Has an impairment of its capital; or, in the case of a savings and loan association or credit union, has assets insufficient to pay its debts and the amount due members upon their shares;
>
> (f) Has suspended payment of its obligations; or, in the case of a savings and loan association, has failed for two years after a withdrawal application has been filed with it by any shareholder to pay such withdrawal application in full;
>
> (g) Has neglected or refused to comply with the terms of a duly issued order of the superintendent;
>
> (h) Has refused, upon proper demand, to submit its records and affairs for inspection to an examiner of the department;
>
> (i) Has refused to be examined upon oath regarding its affairs.

(j) Has refused or failed to take proceedings for voluntary liquidation in accordance with the requirements of subdivision eight or subdivision nine of section six hundred five of this chapter.

2. The superintendent may, in his discretion, and upon such conditions as may be approved by him, surrender possession and permit such banking organization to resume business.

2. Massachusetts. *Annotated Laws of Massachusetts*, Vol. 3, ch. 93, sec. 34, provides in part as follows:

SEC. 34. *Powers and Duties of Commissioner of Banks as to Savings and Loan Associations.*—The commissioner of banks shall have the same powers and duties in respect to savings and loan associations which he now has or may hereafter have in respect to saving banks. * * *

Vol. 5, ch. 167, sec. 22 provides:

SEC. 22. *When Commissioner may take possession of bank; voluntary dissolution.*—Whenever it shall appear to the commissioner that any bank has violated its charter or any law of the commonwealth, or is conducting its business in an unsafe or unauthorized manner, or that its capital is impaired, or if it shall refuse to submit its books, papers and concerns to the inspection of the commissioner or of his duly authorized agents, or if any officer of such bank shall refuse to be examined on oath by the commissioner or his duly authorized assistants touching its concerns, or if it shall suspend payment of its obligations, or if from an examination or from a report provided for by law the commissioner shall have reason to conclude that such bank is in an un-

sound or unsafe condition to transact the business for which it is organized, or that it is unsafe and inexpedient for it to continue business, the commissioner may take possession forthwith of the property and business of such bank and may retain possession thereof until the bank shall resume business or until its affairs shall finally be liquidated as herein provided.

See also Vol. 5, ch. 170B, Sec. 4 (taking possession of cooperative banks).

3. California. *Deering's California General Laws*, Vol. 1, Act 986, sec. 13.11, provides as follows:

SEC. 13.11. *Power to take possession of association.*—If the commissioner as the result of any examination or from any report made to him or to any association doing business in this state or its investors or any thereof, shall find that such association is violating the provisions of its articles of incorporation or charter or by-laws or any law of this state, or is conducting its business in an unsafe or injurious manner, he may by an order addressed to such association direct a discontinuance of such violations or unsafe or injurious practices and a conformity with all the requirements of law; and if such association shall not comply with such order within the time specified therein, or if it shall appear to the commissioner that any association is in an unsafe condition or is conducting its business in an unsafe or injurious manner such as to render its further proceeding hazardous to the public or to any or all of its investors, or if he shall find that its assets are impaired to such an extent that, after deducting all liabilities, other than to its investors they do not equal or exceed the sum of the

value of its outstanding shares and investment certificates and the par value of its outstanding stock, or if any association shall refuse to submit its books, papers and accounts to the inspection of the commissioner or any of his examiners, deputies or assistants, or if any officer thereof shall refuse to be examined upon oath concerning the affairs of such association, then the commissioner may forthwith demand and take possession of the property, business and assets of such association and retain such possession until such association shall with the consent of the commissioner resume business, or until its affairs be liquidated. Such association may, with the consent of the commissioner, resume business upon such conditions as may be approved by him.

4. Indiana. *Burns Indiana Statutes Annotated* (1933), Section 18–301, provides:

18–301. *When department may take possession.*—In addition to any and all other powers conferred by this act, the department is hereby authorized to take possession of the business and property of any financial institution to which this act is applicable, except small loan companies, whenever it shall appear to the department that such financial institution:

(a) Has violated its articles of incorporation, or any law of this State, or any rule or regulation made and promulgated by the department; or

(b) Is conducting its business in an unauthorized or unsafe manner; or

(c) Is in an unsound or unsafe condition; or

(d) Can not, with safety and expediency, continue business; or

(e) Has an impairment of its capital; or

(f) Has suspended payment of its obligations; or

(g) Has neglected or refused, for a period of thirty (30) days, to comply with the terms of a duly issued order of the department, essential to preserve the solvency of such financial institution; or

(h) Has refused, upon proper demand, to submit its records and affairs for inspection to the department; or

(i) Has refused to be examined upon oath regarding its affairs; or

(j) Is insolvent or in imminent danger of insolvency.

5. Ohio. *Page's Ohio General Code Annotated*, Vol. 1, section 687, provides:

SEC. 687. *Superintendent may take possession of building and loan association, when.*—If upon examination, the superintendent of building and loan associations finds that the affairs of a domestic building and loan association are in an unsound or unsafe condition, or that it is conducting its business in whole or in substantial part contrary to law, or failing to comply therewith, or that its affairs are not being conducted for the best interests of its depositors, shareholders or creditors, he may, with the written approval of the director of commerce, forthwith take possession of the business and property of such building and loan association.

6. New Jersey. *New Jersey Statutes Annotated*, Title 17, Article 11, section 17:12-65, provides:

17:12-65. *Causes for revocation of authority* When it appears to the commis-

sioner that the interests of the creditors or shareholders of an association are being jeopardized because the association has violated its charter or a law of this State, or is conducting its business in an unsafe or unauthorized manner, or if the association refuses to submit its books, papers and concerns to the inspection of the commissioner or an examiner appointed by him, or if an officer or director refuses to be examined on oath regarding the affairs of the association, or if the association suspends payment of its obligations, or, if from an examination or report provided for by this chapter, the commissioner has reason to conclude that the association is in an unsound or unsafe condition to transact business, or that it is insolvent, or that it is unsafe or inexpedient for it to continue business, or if the association neglects or refuses to observe an order of the commissioner issued pursuant to section 17:12–64 of this title, he may, if the association is of another State, revoke and cancel its authority to do business in this State, and if the association is incorporated under the laws of this State, proceed in the manner provided by sections 17:12–66 to 17:12–80 of this title.

Section 17:12–67 provides:

17:12–67. *Taking possession of property and business; business continued or liquidated* The commissioner may forthwith take possession of the property and business of the association and retain such possession until the property and business of the association shall be returned to the management of its board of directors, or its affairs be finally liquidated as herein provided. On taking possession of the

property and business of any such association, the commissioner may continue the operation of the business of the association until its property and business shall be returned to the management of the board of directors of the association, or such association shall merge or consolidate with another association, or until liquidation of the association shall commence, as hereinafter provided.

7. Kentucky. *Kentucky Revised Statutes* (1946), section 289.420, provides:

> "289.420 [874f; 874g] *When director of banking to take charge of associations.*—The director of banking may take charge of any association whenever:
>
> (1) It appears to him that the assets of the association do not exceed the dues paid in on the shares, or that it is conducting its business in a fraudulent, illegal, or unsafe manner; or
>
> (2) The association or its officers willfully refuse, after demand by the director of banking, to comply with any of the provisions of this chapter.

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